Supreme Court, U.S.
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In the Supreme Court of the United States

No. 78-642

MILTON J. SHAPP, Governor; GERALD GORNISH, Acting Attorney General; CARYL M. KLINE, Secretary of Education; GEORGE S. PULAKOS, Secretary of Transportation; LEONARD BACHMAN, M.D., Secretary of Health; KENT D. SHELHAMER, Secretary of Agriculture; MAURICE K. GODDARD, Secretary of Environmental Resources, and the GOVERNOR'S JUSTICE COMMISSION,

Appellants

v.

ROBERT E. CASEY, State Treasurer

and

THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellees

On Appeal From the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

No. ———

MILTON J. SHAPP, Governor; GERALD GORNISH, Acting Attorney General; CARYL M. KLINE, Secretary of Education; GEORGE S. PULAKOS, Secretary of Transportation; LEONARD BACHMAN, M.D., Secretary of Health; KENT D. SHELHAMER, Secretary of Agriculture; MAURICE K. GODDARD, Secretary of Environmental Resources, and the GOVERNOR'S JUSTICE COMMISSION,

Appellants

v.

ROBERT E. CASEY, State Treasurer

and

THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellees

On Appeal From The Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

Appellants MILTON J. SHAPP, Governor, GERALD GORNISH, Acting Attorney General, CARYL M. KLINE, Secretary of Education, GEORGE S. PULAKOS, Secretary

of Transportation, LEONARD BACHMAN, M.D., Secretary of Health, KENT D. SHELHAMER, Secretary of Agriculture, MAURICE K. GODDARD, Secretary of Environmental Resources, and the GOVERNOR'S JUSTICE COMMISSION, bring this appeal from the opinion and final judgment entered on July 19, 1978 by the Supreme Court of Pennsylvania, upholding the constitutionality of Act 117 of 1976, Pa. Stat. Ann. tit. 72, §4611-4617 and Act 17-A of 1976 (Federal Augmentation Appropriation Act of 1976). Act 117 subjects to the appropriation power of the Pennsylvania General Assembly all federal funds appropriated by Congress and allocated by the Federal Government to agencies of the Commonwealth of Pennsylvania. Act 17-A of 1976 purported to appropriate federal funds for the 1976-77 fiscal year in accordance with Act 117.

This appeal presents a substantial federal question of federal-state relations which merits plenary review. Appellants respectfully request this Court to note jurisdiction and permit the filing of briefs and the presentation of oral argument on the substantial question presented.

CITATION TO OPINIONS BELOW

The final judgment and opinions of the Pennsylvania Supreme Court entered July 19, 1978 have not yet been reported. The final judgment and opinions are set forth in the accompanying Appendix at 5a.

The order and opinion of the Commonwealth Court of Pennsylvania are reported at 27 Pa. Commonwealth Ct. 312, 367 A.2d 791 (1976).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C.A. §1257 (2) in that this is an appeal from the final judgment of the Supreme Court of Pennsylvania sustaining a state statute which was challenged under the Supremacy Clause of the United States Constitution.

The opinion and final judgment of the Supreme Court of Pennsylvania were entered on July 19, 1978. This appeal was commenced on August 16, 1978.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, clause 2 of the Constitution of the United States provides:

> This Constitution, and the Laws of the United States which shall be made in Presence thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law, of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

Article III, section 24 of Pennsylvania Constitution provides:

> No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers; but cash refunds of taxes, license fees and other charges paid or collected, but not legally due, may be paid as provided by law, without appropriation from the fund into which they were paid on warrant of the proper officer.

STATUTORY PROVISIONS INVOLVED

Act 117 of 1976 is reported at 1976 Pa. Laws 469, PA. STAT. ANN. tit. 72, §§4611-4617 (Supp. 1973). Pertinent sections are set forth below and the statute is set forth in its entirety in the appendix. The Federal Augmentation Appropriation Act of 1976, No. 17-A, is officially reported at 1976 Pa. Laws 1383.

Act 117 of 1976 states in pertinent part:

> Section 3. The State Treasurer is hereby specifically prohibited from issuing any warrant for requisitioned funds which were derived in whole or in part, from Federal funds unless such funds have been specifically appropriated by an act of the General Assembly.
>
> Section 4. The State Treasurer is hereby specifically prohibited from issuing any warrant for requisitioned funds which will be used, directly or indirectly, as matching funds to Federal funds unless such Federal funds have been specifically appropriated by an act of the General Assembly.
>
> Section 5. Except as may be hereinafter provided in this section, no Federal funds, whether designated as grants, augmentations, credits or otherwise, received from the Federal Government in any fiscal year shall, by executive order of the Governor or by any other executive action, be deposited in or designated as a special or restricted fund account, separate and distinct from the General Fund account. All such federal funds shall be deposited in and credited to the

> General Fund account, be contained in the budget as hereinafter provided, and be available for appropriation by the General Assembly as part of its operating budget, except that such federal funds need not be deposited in nor disbursed by appropriation from the General Fund account under the following limited statutory circumstances. If the General Assembly has by statutory enactment created a special fund or restricted receipt account and has specifically provided therein for an exclusive, special purpose or purposes for which Federal funds deposited in such special fund or restricted receipt account can only be used, then under such statutory circumstances, Federal funds received which are specifically and exclusively earmarked for such General Assembly determined special fund or restricted receipt purpose or purposes may be deposited in such statutorily created special fund or restricted receipt account. And, without further statutory appropriation being required, can be used solely and exclusively for such specific statutory special fund or restricted receipt purpose or purposes. But, under no circumstances shall Federal funds received and deposited in such statutorily created special fund or restricted receipt account be disbursed by executive order of the Governor or by any other executive action for any purpose or purposes not specifically prescribed by the statute which created said special or restricted receipt account, except by appropriation made by law during the fiscal year in which such funds were received (1a).

QUESTION PRESENTED

I. Is the Supremacy Clause of the United States Constitution violated by a state constitutional or statutory provision which prohibits the state treasurer from disbursing federal funds to state officials and agencies unless such funds have been specifically appropriated by the state legislature, where Acts of Congress specifically provide for the allocation of said funds directly to qualifying state officials and agencies?

STATEMENT OF THE CASE

On July 7, 1976, the Governor of the Commonwealth of Pennsylvania, various cabinet officers of the Executive Branch and the Governor's Justice Commission[1] brought suit in the Commonwealth Court of Pennsylvania challenging the constitutionality of Acts 117 and 17-A of 1976. Act 117 of 1976, Pa. Stat. Ann. tit. 72, §§4611-4617, prohibits the State Treasurer from disbursing federal funds on deposit in the State Treasury unless such funds have been specifically appropriated by an Act of the General Assembly. Act 17-A in turn, purported to appropriate certain federal funds for the 1976-77 fiscal year, in accordance with Act 117.

The Executive challenged the constitutionality of these acts, asserting, *inter alia*,[2] that they violated the Supremacy Clause of the United States Constitution.[3] The Executive relied on numerous federal statutes which specifically pro-

[1] Hereinafter collectively referred to as "the Executive". The Governor's Justice Commission is the state planning agency established in accordance with sections 203, 302 and 303 of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C.A. §§3723, 3732 and 3733.

[2] Although not raised herein, the Executive asserted in the court below that Acts 117 and 17-A of 1976 also violated the Contract Clauses of the United States and Pennsylvania Constitutions. U.S. Const. Art. I, §10; Pa. Const. Art. I, §17. In addition, the Executive contended as matters of state constitutional law that the challenged acts violated the separation of powers doctrine inherent in the Pennsylvania Constitution and did not fall within the ambit of Article III, section 24 of the Pennsylvania Constitution.

[3] U.S. Const. Art. VI, clause 2.

vided for the allotment of federal funds directly to state administrative officials and agencies. The Executive sought a declaratory judgment holding these acts unconstitutional, a writ of mandamus and injunctive relief directing the State Treasurer to honor the requisitions presented by all proper state officials for federal funds allocated to them pursuant to Acts of Congress.

The General Assembly of the Commonwealth of Pennsylvania intervened as a defendant and thereafter the Commonwealth Court heard argument on the parties' cross-motions for summary judgment. The Commonwealth Court granted the motions for summary judgment filed by the State Treasurer and the General Assembly and denied the Executive's cross-motion for summary judgment. *Shapp v. Sloan,* 27 Pa. Commonwealth Ct. 312, 367 A.2d 791 (1976). The Commonwealth Court explicitly rejected the Executive contention that Acts 117 and 17-A of 1976 violated the Supremacy Clause of the United States Constitution. *Shapp v. Sloan, supra,* at 326, 367 A.2d at 798.

The Executive immediately appealed to the Supreme Court of Pennsylvania. On July 19, 1978, the Supreme Court entered final judgment and an opinion affirming the order of the Commonwealth Court and upholding the constitutionality of Acts 117 and 17-A of 1976. *Shapp v. Sloan,* No. 214 Jan. Term 1977 (Pa. Supreme Court, filed July 19, 1978) (Roberts and O'Brien JJ., dissenting).

In its opinion, the Supreme Court held that Article III, section 24 of the Pennsylvania Constitution requires that all monies in the State Treasury, including federal funds, must be appropriated by the General Assembly before they may be lawfully disbursed. Regarding the Executive's argument that Acts 117 and 17-A of 1976 violate the Supremacy

Clause of the United States Constitution, the court below held:

> We do not find the clear and direct conflict necessary to invalidate a state law under the Supremacy Clause, and must therefore reject appellant's second contention. The federal legislation in question encourages state control of these programs. As long as the funds are not diverted from their intended purposes and the terms and conditions proscribed [sic] by the Congress are not violated, there is no inconsistency between the provisions of the federal programs and state legislative administration of the funds. The federal government has expressly given the states a wide discretion in dealing with these funds. That discretion is most logically exercised by the branch of state government which is constitutionally empowered to exercise control over *all* expenditures. (23a) (Emphasis in original.)

On August 16, 1978, the Executive initiated this appeal.

THE QUESTION IS SUBSTANTIAL

Is the Supremacy Clause of the United States Constitution Violated by a State Constitutional or Statutory Provision That Prohibits the State Treasurer From Disbursing Federal Funds to State Officials and Agencies Unless Such Funds Have Been Specifically Appropriated by the State Legislature Where Acts of Congress Specifically Provide for the Allocation of Said Funds Directly To Qualifying State Officials and Agencies?

The state constitutional and statutory provisions challenged here subject to the appropriation power of he General Assembly the vast majority of the approximately $1.5 billion in federal funds annually authorized by Congress and the Federal Government to be spent by agencies of the Commonwealth of Pennsylvania. Notwithstanding explicit federal statutory language in numerous Acts of Congress which establish state administrative officials and agencies as the channels through which federal funding must flow, the court below failed to find the clear and direct conflict necessary to invalidate Acts 117 and 17-A of 1976 under the Supremacy Clause.

This Court has repeatedly held that, where cooperative federal-state programs are involved, the Federal Government "may impose the terms and conditions upon which the money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such Federal terms and conditions is to that extent invalid." *King v. Smith,* 392 U.S. 309, 333 n.4 (1968). *Accord, Townsend*

v. Swank, 404 U.S. 282 (1971). Where Congress legislates in this manner, article VI, clause 2 of the Constitution "forbids encroachment on the supremacy of Federal legislative action." *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 295 (1958). *Accord, Oklahoma v. Civil Service Commission,* 330 U.S. 127 (1947).

In light of these constitutional principles, the court below misperceived the nature of the congressional constraints upon the Commonwealth's use of federal funds when it observed that: "The federal government may impose conditions and limitations upon the monies it allocates to the states, and the General Assembly must stay within those guidelines or refuse the grant." (21a). To the contrary, under this Court's decision in *King v. Smith, supra,* once it has authorized participation in a federal program, a state legislature no longer has the option of ignoring federal law in a particular instance and simply foregoing the funding.

In Act 117 and 17-A of 1976, the General Assembly has neither modified the *substantive* state statutory authority of any state official or agency to commit the Commonwealth to participation in any of the various federal programs involved, nor has it withheld matching state funds. Had it done so and required a state official or agency to submit a state plan unacceptable under federal law, or, alternatively, withheld matching state funds, the consequence of federal rejection of such a plan would indeed be the loss of *all* federal funding for the program involved.

In this case, however, the General Assembly has authorized the Executive to submit state plans and obtain federal funding, yet also asserted a right through Acts 117 and 17-A to interfere *thereafter* with the way in which a portion of the funding shall be spent. Such state legislation

necessarily must fall under the Supremacy Clause. Otherwise, a state legislature could nullify the will of Congress and frustrate the operation of federal programs.[4]

The majority below failed to give even cursory consideration to the specific language or legislative history of any of the federal statutes cited by the Executive in order to illustrate the exclusive role that Congress has established for the executive branch of state government.[5] These statutes each require the creation of a single state administrative agency for the purpose of requesting and receiving from the Federal Government the federal funds to be utilized in implementing the federal program involved. The court below clearly erred in its conclusion that Congress accorded to state legislatures, not state executives, the wide discretion to deal with these funds.

Moreover, the record in this case concretely demonstrates the harm congressionally created programs may suffer when federal funds are subjected to state legislative control. The demise of the Office of the Special Prosecutor, established by the Pennsylvania Department of Justice to investigate and prosecute political corruption, was a direct result of the refusal of the General Assembly to "appropri-

[4] Lower federal courts have repeatedly applied this rationale where state legislatures have imposed conflicting requirements upon federal programs. See, e.g., *Woolfolk v. Brown*, 325 F. Supp. 1162, 1171 (E.D. Va. 1971), affd. 456 F.2d 652 (4th Cir. 1972), cert. denied, 409 U.S. 885 (1972); *Douglas Independent School District No. 3 v. Jorgenson*, 293 F. Supp. 849, 854 (D.S.D. 1968); *Shepheard v. Godwin*, 280 F. Supp. 869 (E.D. Va. 1968).

[5] See, e.g., Omnibus Crime Control and Safe Streets Act of 1968, supra, 42 U.S.C.A. §§3723, 3732, 3733; Elementary and Secondary Education Acts of 1968, 20 U.S.C.A. §§241a, 241g; Comprehensive Employment and Training Act of 1973, 29 U.S.C.A. §§801, 814.

ate" in Act 17-A the federal funds allocated by the Law Enforcement Assistance Administration to the Governor's Justice Commission in accordance with the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, *supra*. As this Court observed in *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941);

> "Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Congress' goal in directing that federal monies be channeled through state planning agencies under the governor's jurisdiction was to enable "local law enforcement officials to coordinate their state's overall efforts to meet unique local problems and conditions" and to avoid creating any impetus for the establishment of a "federal police force." *Ely v. Velde*, 451 F.2d 1130, 1136 (4th Cir. 1971). There can be no doubt that, contrary to the lower court's conclusion, federal funds were diverted by the General Assembly from their intended purpose, namely, disbursement by the Governor's Justice Commission, thereby violating the terms and conditions prescribed by Congress. Given this conflict between the implementation of federal law on the one hand and Acts 117 and 17-A on the other, the state statutes must be held invalid under the Supremacy Clause. *Ray v. Atlantic Richfield Co.*, 98 S.Ct. 988 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

Where other state legislatures have sought to take control of federal funds and appropriate them, state courts in these jurisdictions have uniformly held as a matter of state constitutional law that "federal contributions are not the subject of the appropriation power of the Legislature."

MacManus v. Love, 179 Colo. 218, 222, 499 P.2d 609, 610 (1972). *Accord, Opinion of the Justices,* Mass. Adv. Sh. 1978, 1811, 378 N.E. 2d 433 (1978); *Navajo Tribe v. Arizona Department of Administration,* 111 Ariz. 279, 528 P.2d 623 (1975); *State ex rel. Sega v. Kirkpatrick,* 86 N.M. 359, 524 P.2d 975 (1974). *But see, Opinion of the Justices,* 381 A.2d 1204 (N.H. 1978). This appeal presents the first occasion in which the asserted authority of a state legislature to "appropriate" federal funds has been sustained in the face of a challenge grounded on the Supremacy Clause of the United States Constitution. The judgment of the court below is in error in its application of the Supremacy Clause to Acts 117 and 17-A of 1976 and accordingly must be reversed.

In the past two decades, federal aid to state and local governments has burgeoned to $80 billion in fiscal year 1978.[6] Most of the fifty state legislatures assert varying degrees of appropriation power over these funds. The substantial federal question raised in this case thus directly affects the administration of federally funded programs not only in Pennsylvania, but in all states.

[6] Advisory Commission on Intergovernmental Relations, *In Brief—The Intergovernmental Grant System: An Assessment and Proposed Policies,* Washington, D.C., U.S. Government Printing Office, 1978, at 2.

CONCLUSION

Based upon the foregoing arguments and authorities, appellants respectfully request that this Court note jurisdiction in this appeal, receive full briefs on the merits and hear oral argument in order to resolve the substantial question presented by this case.

Respectfully submitted,

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APPENDIX

ACT NO. 117 of 1976

Section 1. Requisitions on state treasury; indicating federal funds requested.

Any person authorized by law to issue requisitions for the payment of moneys from the State Treasury shall, when submitting any such requisition to the State Treasury, indicate thereon whether any of the funds so requested were derived, in whole or in part, from Federal funds.

Section 2. Requisitions on state treasury; indicating requested funds as matching funds to federal funds.

Any person authorized by law to issue requisitions for the payment of moneys from the State Treasury shall, when submitting any such requisition to the State Treasurer, indicate thereon whether any of the funds so requested will be used, directly or indirectly, as matching funds to Federal funds.

Section 3. Warrants for requisitioned federal funds; specific appropriation by act of General Assembly.

The State Treasurer is hereby specifically prohibited from issuing any warrant for requisitioned funds which were derived, in whole or in part, from Federal funds unless such funds have been specifically appropriated by an act of the General Assembly.

Section 4. Warrants for requisitioned funds used as matching funds to federal funds; specific appropriation by act of General Assembly.

The State Treasurer is hereby specifically prohibited from issuing any warrants for requisitioned funds which will be used, directly or indirectly, as matching funds to Federal funds unless such Federal funds have been specifically appropriated by an act of the General Assembly.

Section 5. Deposit of funds; credit to general fund account; exception.

Except as may be hereinafter provided in this section, no Federal funds, whether designated as grants, augmentations, credits or otherwise, received from the Federal Government in any fiscal year shall, by executive order of the Governor or by any other executive action, be deposited in or designated as a special or restricted fund account, separate and distinct from the General Fund account. All such federal funds shall be deposited in and credited to the General Fund account, be contained in the budget as hereinafter provided, and be available for appropriation by the General Assembly as part of its operating budget, except that such federal funds need not be deposited in nor disbursed by appropriation from the General Fund account under the following limited statutory circumstances. If the General Assembly has by statutory enactment created a special fund or restricted receipt account and has specifically provided therein for an exclusive, special purpose or purposes for which Federal funds deposited in such special fund or restricted receipt account can only be used, then under such statutory circumstances, Federal funds received which are specifically

and exclusively ear-marked for such General Assembly determined special fund or restricted receipt purpose or purposes may be deposited in such statutorily created special fund or restricted receipt account. And, without further statutory appropriation being required, can be used solely and exclusively for such specific statutory special fund or restricted receipt purpose or purposes. But, under no circumstances shall Federal funds received and deposited in such statutorily created special fund or restricted receipt account be disbursed by executive order of the Governor or by any other executive action for any purpose or purposes not specifically prescribed by the statute which created said special or restricted receipt account, except by appropriation made by law during the fiscal year in which such funds were received.

Section 6. Preparation of state budget estimates; inclusion of federal funds received or anticipated; legislative intent.

Notwithstanding anything in any law to the contrary, it shall be the duty of the Secretary of Revenue when submitting to the Budget Secretary and to the Governor his officially certified estimate of revenues and receipts from any and all sources for use in the preparation of the Governor's proposed budget for the ensuing fiscal year to specifically include therein an estimate of any and all funds received or anticipated to be received from the Federal Government whether such funds are designated as grants, augmentations, credits or otherwise, together with the purposes for which such funds, as aforesaid, are provided or to be provided. The Secretary of Revenue shall provide a Federal funds estimate to the Governor for use by the Governor in signing any appropriation bill.

The General Assembly hereby declares its legislative intent not to enact any operating budget for any fiscal year unless and until a budget is submitted in accordance with the provisions of this act.

Section 7. Law governing.

Notwithstanding any other law or portion of any other law including section 3 of the act of December 27, 1933 (Sp. Sess. 1933-34, P.L. 113, No. 29), entitled "An act authorizing the State Treasurer to act as custodian of moneys and securities contributed to or deposited with the Commonwealth, or officers, departments, boards or commissions of the Commonwealth; prescribing the manner in which such moneys or securities shall be held and disbursed or delivered up; and making an appropriation to the Treasury Department for the cost of administering such moneys and securities," the provisions of this act shall prevail.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 214 January Term, 1977

Milton J. Shapp, Governor, et al.,
Appellants

v.

Grace M. Sloan, State Treasurer,

and

The General Assembly of the Commonwealth of Pennsylvania

No. 586 January Term, 1976

Milton J. Shapp, Governor, et al.,

v.

Grace M. Sloan, State Treasurer,

and

The General Assembly of the Commonwealth of Pennsylvania
Appellant

No. 4 January Term, 1977

Milton J. Shapp, Governor, et al.,

Appellants

v.

Grace M. Sloan, State Treasurer

and

The General Assembly of the Commonwealth of Pennsylvania

Appeal from the Final Order of the Commonwealth Court of Pennsylvania at No. 1194 C. D. 1976 and Cross-Appeals from the Commonwealth Court's Order dated July 15, 1975.

OPINION

JUSTICE MANDERINO, Filed: Jul 19 1978:

On July 7, 1976, the Governor of Pennsylvania, various cabinet officers and the Governor's Justice Commission—appellants in this case—filed a petition for review directed against the State Treasurer challenging the constitutionality of Acts 117 and 17-A of 1976. They sought a declaratory judgment holding these acts to be null and void, and a writ of mandamus and injunctive relief to compel the State Treasurer to honor requisitions properly presented for federal funds allocated to State agencies pursuant to Acts of Congress. The Governor, Attorney General and the Justice Commission asked also

for a preliminary injunction to enjoin the State Treasurer from refusing to honor requisitions for payment of federal funds to the Department of Justice for salaries and operating expenses incurred by the Office of the Special Prosecutor. The General Assembly was granted permission to intervene as a respondent.

After a hearing on the request for the preliminary injunction seeking release of the Special Prosecutor's funds, the Commonwealth Court entered an order dated July 15, 1975, denying the injunction as sought but granting an injunction directing the Treasurer to issue her warrant for payment of expenses already incurred, up to the amount of federal funds allocated to that office by the Law Enforcement Assistance Administration (LEAA) through June 30, 1976 and still unexpended. This Court denied a stay of that order. The parties are now before us on cross-appeal from this order of July 15, 1975.

Appellants are also appealing from the final order of the Commonwealth Court entered on December 3, 1976, granting the State Treasurer's and General Assembly's motions for summary judgment and dismissing appellants' motions for partial summary judgment and modification of order.

From 1961 to 1975, the annual appropriations acts of the General Assembly contained a general provision appropriating grants made to the Commonwealth for various federally funded programs to the State agency involved in the programs' administration. The provision in the General Appropriations Act of 1975 was typical of these general allocations:

> "In addition to the amounts appropriated by this act, all monies received from the Federal Govern-

ment, or from any other source as contributions for the programs provided herein, or as payment for services or materials furnished by one institution as revenues, *shall be paid into the General Fund and are hereby appropriated out of the General Fund* for the purposes of the respective appropriations." (Emphasis added.)

General Appropriations Act of 1975, 1975 P.L. No. 8-A, §8(b).

Although many of these General Appropriations Acts also appropriated funds for some specific programs, legislative control over the funds was, in the General Assembly's own terms, "minimal." At most, the General Assembly's actual control consisted of authorizing applications for particular federal programs and placing conditions or restrictions upon application for federal funds. The legislature did, of course, maintain exclusive control over appropriations of State matching funds and general revenue sharing.

Despite the minimal control exercised in the yearly Appropriations Acts, it is to be noted that for more than a decade the Acts clearly and unambiguously placed such federal funds into the State's General Fund, apparently without objection from the Executive.

By 1975, federal aid programs had been increasingly implemented in Pennsylvania, and federal funds accounted for approximately 25% of the total resources of the Commonwealth. The General Assembly accordingly decided to exercise over such federal funds the full control which it considers its constitutional responsibility as the branch of government entrusted with control of the state's finances.

Therefore, on June 29, 1976, following extensive study and hearings, the General Assembly enacted Act 117 over the Governor's veto. The text is as follows:

"§4611. Requisitions on state treasury; indicating federal funds requested

Any person authorized by law to issue requisitions for the payment of moneys from the State Treasury shall, when submitting any such requisition to the State Treasury, indicate thereon whether any of the funds so requested were derived, in whole or in part, from Federal funds.

§4612. Requisitions on state treasury; indicating requested funds as matching funds to federal funds

Any person authorized by law to issue requisitions for the payment of moneys from the State Treasury shall, when submitting any such requisition to the State Treasurer, indicate thereon whether any of the funds so requested will be used, directly or indirectly, as matching funds to Federal funds.

§4613. Warrants for requisitioned federal funds; specific appropriations by act of General Assembly

The State Treasurer is hereby specifically prohibited from issuing any warrant for requisitioned funds which were derived, in whole or in part, from Federal funds unless such funds have been specifically appropriated by an act of the General Assembly.

§4614. Warrants for requisitioned funds used as matching funds to federal funds; specific appropriation by act of General Assembly

The State Treasurer is hereby specifically prohibited from issuing any warrants for requisitioned

funds which will be used, directly or indirectly, as matching funds to Federal funds unless such Federal funds have been specifically appropriated by an act of the General Assembly.

§4615. Deposit of funds; credit to general fund account; exception

Except as may be hereinafter provided in this section, no Federal funds, whether designated as grants, augmentations, credits or otherwise, received from the Federal Government in any fiscal year shall, by executive order of the Governor or by any other executive action, be deposited in or designated as a special or restricted fund account, separate and distinct from the General Fund account. All such federal funds shall be deposited in and credited to the General Fund account, be contained in the budget as hereinafter provided, and be available for appropriation by the General Assembly as part of its operating budget, except that such federal funds need not be deposited in nor disbursed by appropriation from the General Fund account under the following limited statutory circumstances. If the General Assembly has by statutory enactment created a special fund or restricted receipt account and has specifically provided therein for an exclusive, special purpose or purposes for which Federal funds deposited in such special fund or restricted receipt account can only be used, then under such statutory circumstances, Federal funds received which are specifically and exclusively ear-marked for such General Assembly determined special fund or restricted receipt purpose or purposes may be deposited in such statutorily created special fund or restricted receipt account. And, without further statutory appropriation being required, can be used solely and exclusively for such specific statutory special fund or restricted receipt purpose or purposes. But, under no circumstances shall Federal funds received and deposited in such statutorily created special fund or restricted receipt account be disbursed by executive order of the Governor or by any other executive action for any purpose or purposes not specifically prescribed by the statute which created said special or restricted receipt account, except by appropriation made by law during the fiscal year in which such funds were received.

§4616. Preparation of state budget estimates; inclusion of federal funds received or anticipated; legislative intent

Notwithstanding anything in any law to the contrary, it shall be the duty of the Secretary of Revenue when submitting to the Budget Secretary and to the Governor his officially certified estimate of revenues and receipts from any and all sources for use in the preparation of the Governor's proposed budget for the ensuing fiscal year to specifically include therein an estimate of any and all funds received or anticipated to be received from the Federal Government whether such funds are designated as grants, augmentations, credits or otherwise, together with the purposes for which such funds, as aforesaid, are provided or to be provided. The Secretary of Revenue shall provide a Federal funds estimate to the Governor for use by the Governor in signing any appropriation bill.

The General Assembly hereby declares its legislative intent not to enact any operating budget for any

fiscal year unless and until a budget is submitted in accordance with the provisions of this act.

§4617. Laws governing

Notwithstanding any other law or portion of any other law including section 3 of the act of December 27, 1933 (Sp. Sess. 1933-34, P.L. 113, No. 29), entitled 'An act authorizing the State Treasurer to act as custodian of moneys and securities contributed to or deposited with the Commonwealth, or officers, departments, boards or commissions of the Commonwealth; prescribing the manner in which such moneys or securities shall be held and disbursed or delivered up; and making an appropriation to the Treasury Department for the cost of administering such moneys and securities,' the provisions of this act shall prevail."

1976, P.L. 496, No. 117, 72 P.S. §4611, et seq.

In essence, Act 117 mandates that all federal funds be deposited in the General Fund without designation as a restricted or separate account, and that they be available for appropriation by the General Assembly, (§5, 72 P.S. §4615). The State Treasurer is prohibited from paying out any such federal funds unless pursuant to a specific appropriation by the General Assembly. (§3, 72 P.S. §4613).

Act 17-A of 1976, also in issue, is the Federal Augmentation Appropriation Act of 1976, implementing Act 117 by making the line appropriations of federal monies to the intended programs.

This controversy arose when the State Treasurer refused, in the absence of an appropriation, to disperse to the Justice Department for the office of the Special Prosecutor monies allocated to Pennsylvania by the Law Enforcement Assistance Administration (LEAA).

Appellants urge us to consider numerous arguments in support of their position, bolstered in a voluminous brief by contentions both of policy and of constitutional interpretation. Nevertheless, the conflict revolves around one basic question—the validity of Acts 117 and 17-A of 1976 under the Pennsylvania and the United States Constitutions. If the Acts in issue were constitutionally enacted, the State Treasurer was mandated by law to refuse payment of monies for which no appropriation had been made.

The appropriations power in this Commonwealth is vested in the General Assembly by Article III, Section 24 of the Pennsylvania Constitution, which provides that:

> "[N]o money shall be paid out of the treasury, except on *appropriations made by law* . . . but cash refunds of taxes, licenses, fees, and other charges paid or collected, but not legally due, may be paid, as provided by law, without appropriation from the fund into which they were paid on warrant of the proper officer." (Emphasis added.)

Inasmuch as Article II of the Pennsylvania Constitution gives to the General Assembly the legislative power of the Commonwealth, the above section 24 of Article III requires legislative action before money can be paid out of the treasury.

The appellants argue, however, that Acts 117 and 17-A are not constitutional exercises of the General Assembly's Article III, Section 24 power to make appropriations for funds in the state treasury. They contend that legislative authority over state funds does not extend to federal funds, and that the Acts therefore unconstitutionally expand the state legislative power. In insisting that the General Assembly's paramount power over state funds does not extend to

funds "not raised under state law," appellants offer a plethora of sub-arguments to show that the Executive, rather than the legislature, has the power to control expenditure of funds which the federal government has committed to state executive officers and agencies. Thus, their argument is two-pronged: the Legislature has exceeded its Constitutional power by assuming to control funds not legally at its disposal; and in doing so, has encroached upon the rightful sphere of the executive in violation of the doctrine of Separation of Powers embodied in our Constitution.

In reviewing the constitutionality of a legislative enactment our inquiry is directed only to whether a specific constitutional prohibition has been transgressed. *Commonwealth v. Sutley,* Pa. , 378 A.2d 780 (1977). We are bound both by statute and by more than a century of case law to honor a strong presumption in favor of the constitutionality of a statute. *Commonwealth v. Sutley, supra; School Districts of Deer Lake and Allegheny Valley v. Kane,* 463 Pa. 554, 345 A.2d 658 (1975); *Commonwealth ex rel. Schnader v. Liveright,* 308 Pa. 35, 161 A. 697 (1932); *Sharpless v. Mayor of Philadelphia,* 21 Pa. 147 (1853).

If the legislation has been duly enacted by the General Assembly and is within the scope of legislative power, the challengers bear the heavy burden of proving beyond a reasonable doubt that it "clearly, palpably and plainly" violates the Constitution. *Commonwealth v. Sutley, supra; Tosto v. Pennsylvania Nursing Home Agency,* 460 Pa. 1, 331 A.2d 198 (1975); *Commonwealth ex rel. Schrader v. Liveright,* 308 Pa. 35, 161 A. 697 (1932).

There are no allegations here of irregularity in the enactment process. Appellants must therefore prove to us that the Acts were clearly and palpably outside the scope of the

legislative powers vested in the General Assembly by Articles II and III of the Constitution or that, even if within the scope of legislative power, other Constitutional prohibitions have been violated by their enactment.

Appellants have failed to prove their basic premise that funds not raised under general state law are constitutionally differentiated from other funds in the State Treasury, and thus constitutionally beyond the scope of the General Assembly's authority. We can find no legal basis for the assumption that federal funds are not subject to the General Assembly's Article III, Section 24 appropriation power.

The only funds excepted from our constitution's mandate that expenditures from the Treasury be made only if pursuant to legislative appropriation are referred to in the second clause of Article III, Section 24 itself: "Cash refunds of taxes, license fees and other charges paid or collected but not legally due." This clause can not be stretched, as appellants would have us believe, to "signify the Framers' intent to dispense with the necessities of an appropriation of monies in the State Treasury not raised under State law." Rather, the clause applies to the narrow situation where refund of an overpayment must be made. It simply authorizes the refund of overpayments without appropriation. When the Commonwealth has acquired monies through error they are unavailable for spending by *any* branch of the government, and their return is no more than the correction of a mistake. The framers of our Constitution explicitly excepted from the appropriations provision monies which could not legally be used by the Commonwealth for any purpose. Had they contemplated any exceptions as to funds which *are* legally available for governmental concerns, it follows that these would also have

been specified. No other limitation or modifications are contained, however, in Article III, Section 24. The framers gave to the General Assembly the exclusive power to pay money out of the state treasury without regard to the source of the funds. In contrast, nowhere in our Constitution is the executive branch given any right or authority to appropriate public monies for any purpose.

Appellants' reliance upon *Commonwealth v. Perkins*, 41 Pa. D. & C. 55 (C.P. Daugh. 1941), aff'd 342 Pa. 529, 21 A.2d 41 (per curiam), aff'd 314 U.S. 586, S.Ct. (1942) (per curiam) is misplaced. Their argument that appropriation is necessary only for funds raised pursuant to state law is based upon the following definition of "appropriation":

> "As we understand the word 'appropriation', when used in the constitutional or legislative sense, it means a designation of money raised by taxation to be withdrawn from the public treasury for a specifically designated purpose."
>
> 41 D. & C. at 62, cited at 342 Pa. 532, 21 A.2d at 48.

Appellants admit that funds derived from other, non-tax sources are also subject to appropriation from the general fund by the General Assembly but insist that the words can be read no more liberally than to include non-tax revenues from in-state sources such as fees, rentals and escheats. The thrust of this portion of the *Perkins* opinion was not to delineate all possible sources of public funds, but to define the term "appropriation." The number of sources of revenue for the state has always been limited. The *Perkins* court also said that "[t]he State has no power to take the property of a citizen except, by way of taxes or eminent domain." (Citation omitted.) *Perkins, supra,* 342 Pa. at 531, 21 A.2d at 47. Thus, it is not surprising that the Court's contemplation of public funds available for State spending appeared to be limited to money raised by taxation. The Court in 1941 could not anticipate that another source of income would become available for wide-spread administration of programs on the State level, and that within three decades, federal funds would constitute a large portion of the budgets of most states in the union.

Whereas, in 1954, more than a decade after *Perkins*, total federal aid to all state governments was $2.9 billion, it was more than $60 billion in 1976. *Information Bulletin*, No. 76-4, p. 1, Advisory Commission on Intergovernmental Relations (Nov. 1976). In an age when state funds were provided almost entirely through state taxation, the *Perkins* court had no reason to foresee the vast impact that federal funding would eventually have on state fiscal matters. To interpret its choice of words as excluding such federal funds from state monies available for appropriation is as illogical as to exclude regulation of air traffic from the Congress' constitutional Commerce Clause powers because not mentioned or contemplated by the framers.

The same defect is apparent in appellants' reliance upon other cases which they insist support their limited definition of monies subject to appropriation as only those raised pursuant to state law. They have seized on cases containing chance definitions of appropriations written to solve problems entirely unrelated to the purposes of this appeal and drafted without contemplation of federal monies as a major source of state funding. The constitution says "no money" shall be paid without an appropriation. We think the constitution means exactly what it says.

The cases relied on from foreign jurisdictions likewise fail to convince us that the legislative power of appropri-

ation does not extend to federal funds. For example, in neither *Navajo Tribe v. Arizona Department of Administration,* 111 Arizona 279, 528 P.2d 623 (1975) nor *Sego v. Kirkpatrick,* 86 N.M. 359, 524 P.2d 975 (N.M. 1974), cited by appellants, were the grantees either officials or agencies of the state government. Neither case, then, is in point in deciding how federal funds granted directly to a state, through an agency or official of the state, shall be dispersed.

Appellants cite *McManus v. Love,* 499 P. 609 (1972), a Colorado case, contending that federal funds received in that state may be expended by the executive branch without legislative approval. We find its reasoning completely unpersuasive. Appellants argue that the executive branch is entitled to use federal funds without legislative approval because the executive branch, or one of its officials or agencies, is the nominal recipient charged with the responsibility for administering the programs for which the funds were received. Accordingly, argue the appellants, the State Treasurer is only the custodian of the funds. That funds are designated custodial funds does not mean that legislative action approving the use of the funds is not needed. *Commonwealth v. Dollar Savings Bank,* 259 Pa. 138, 102 A. 569 (1917); *Commonwealth ex rel. Bell v. Powell,* 249 Pa. 144, 94 A. 746 (1915).

The funds which Pennsylvania receives from the federal government do not belong to officers or agencies of the executive branch. They belong to the Commonwealth. The agency or official who is authorized to apply for federal funds does so only *on behalf of* the Commonwealth. The federal grants are made to the *state,* not to a single branch of state government. See, for example, the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 82 Stat.

197, *as amended,* 42 U.S.C. 3701 et seq. (1970 and Supp. 1978), which throughout its provisions makes clear that grants are to "States" (or "State and local governments"), and nowhere indicates that grants are to be made to a single branch of the state government. Appellants have cited nothing which dictates that the federal laws pursuant to which these programs are funded requires that the Pennsylvania legislature is to be by-passed.

As pointed out earlier, twenty-five percent of Pennsylvania's budget is now derived from federal funds. The logical result of appellants' argument—if the percentage were, as an example, to reach one hundred percent—would be to eliminate the need for a legislative branch of government. The federal government could simply supply federal monies to the executive branch which would proceed to administer the revenue without appropriation of any of the monies by the legislature.

It is fundamental within Pennsylvania's tripartite system that the General Assembly enacts the legislation establishing those programs which the state provides for its citizens and appropriates the funds necessary for their operation. The executive branch implements the legislation by administering the programs. *See, e.g., Stander v. Kelley,* 433 Pa. 406, 250 A.2d 474 (1969). It must do so within the requirements and restrictions of the relevant legislation, and within the amount appropriated by the legislature. The executive branch may not of its own initiative use funds appropriated for one program in carrying out another and may not spend on a program more than its designated amount. It is in this way that the doctrine of separation of powers functions.

Nothing in the federal legislation pursuant to which these funds are granted suggests that the same principles by

which programs wholly state funded are operated are inapplicable to programs for which federal funds are supplied. That the executive agency or official must use federal monies within the program for which they were intended, and must provide an accounting to show that they were so used, does not lead to the conclusion that the funds are under that official's control and outside the control of the legislature. No one would suggest such a conclusion as to programs wholly initiated by the Commonwealth itself.

The programs for which these federal funds are received are intended by Congress for administration on the state level, and cover matters traditionally of state concern, such as education, law enforcement and public welfare. It is the General Assembly, not the executive branch, which has been given the constitutional power to determine what programs will be adopted in our Commonwealth and how they will be financed. Although this may be done upon the recommendations of the executive branch, the final determinations are legislative in nature. The executive's function is to carry out those programs authorized by legislation.

To hold that the Executive has control of these federal funds would permit a dual system which would result in duplication of services and obliteration of the distinctions between the separate functions and powers of these two co-equal branches of government. It would, for example, enable the Governor to use federal funds to establish and finance one system of agencies for law enforcement or education without the approval or authorization of the very body which is constitutionally empowered to set up and finance state plans for education or law enforcement. With a large portion of the state budget now provided by federal funding, the executive branch could well end up with as much legislative responsibility as the General Assembly

itself. It is *that* result which we feel would "clearly and palpably" violate the doctrine of separation of powers embodied in our Constitution. The fullest efficiency can be achieved only through proper integration and coordination of all programs administered on the state level, be they federally funded, state funded or funded by matching funds. This is most logically achieved if the General Assembly retains its fiscal control while the legislature functions to put the programs into practice.

Appellants seem to fear that legislative fiscal control over federal funds amounts to legislative seizure for its own purposes. The Legislature is not free to use arbitrarily those funds which the Commonwealth has accepted pursuant to agreement with the federal government. The federal government may impose conditions and limitations upon the monies it allocates to the states, and the General Assembly must stay within those guidelines or refuse the grant. Within each grant, however, there remains the necessity to establish spending priorities and to allocate the available monies. This is properly a legislative function.

Appellants have reiterated throughout their brief that it is federal policy to allow state governments as much control as possible over these federally funded programs. It cannot, therefore, be considered an encroachment upon federal supremacy that the legislature, rather than the executive, exercises the discretion granted the state government by the Congress.

We note that at least one federal committee involved with this problem has determined that state legislative control over federal funds does not contravene federal policy and is, in fact, the desirable mode of administration. The Advisory Commission on Intergovernmental Relations

(ACIR), a permanent committee created by the United States Congress in 1959 to monitor the operation of the American federal system and recommend improvements, has urged state legislatures to assume greater control of federal funds coming into state governments.

In its Bulletin 76-4 of November, 1976 referred to *supra*, the commission recommended that state legislatures include all federal aid in appropriation bills, prohibit spending of federal funds over the amount appropriated by the legislature, and establish spending priorities by making the line appropriations within the program allocations. In explaining the rationale behind its recommendations, the Commission noted that the states have been accorded much more discretion in the administration of federal funds since the late 1960's, and that there has also been a sharp increase in the amounts of federal aid granted to the states. These factors suggest the need for legislative involvement in the decisions relating to the uses of these funds.

At the time of the publication of Bulletin 76-4, the ACIR was drafting model legislation for use by state legislatures intending to become more involved in the appropriating of federal funds. In more than a year and a half which has passed since the ACIR first made its recommendations in August, 1976, we have received no indication that Congress has in any way disapproved its committee's actions in advising state legislatures to increase their role in the spending of federal monies. There is no evidence before us to indicate that Congress considers such state legislative involvement an encroachment upon the supremacy of the federal government.

A duly enacted state law will not be found to violate the Supremacy Clause of the United States Constitution unless the state law and the federal law are so inconsistent that they cannot be reconciled or constructed in such a way as to permit both to stand. *See California Equalization v. Goggin*, 191 F.2d 726 (9th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952); *Parker v. Brown*, 319, U.S. 341 (1943); *Missouri Kansas & Texas Railway Co. v. Haber*, 169 U.S. 623 (1898).

We do not find the clear and direct conflict necessary to invalidate a state law under the Supremacy Clause, and must therefore reject appellants' second contention. The federal legislation in question encourages state control of these programs. As long as the funds are not diverted from their intended purposes and the terms and conditions proscribed by the Congress are not violated, there is no inconsistency between the provisions of the federal programs and state legislative administration of the funds. The federal government has expressly given the states a wide discretion in dealing with these funds. That discretion is most logically exercised by the branch of state government which is constitutionally empowered to exercise control over *all* expenditures.

Appellant's third Constitutional argument against Acts 117 and 17-A is that they impair contractual obligations between the Commonwealth and the federal government and between the Commonwealth and its sub-grantees, in violation of the contracts clauses of both the United States and Pennsylvania Constitutions.

As to the alleged impairment of contract rights between the federal government and the Commonwealth, we agree with appellees that these grants are not contractual in nature, but are better classified as conditional gifts. The funds are granted to the state subject to compliance with

certain conditions. Once granted, the discretion for their use within the intended program is generally left to the state. State participation is wholly voluntary. Likewise, the federal government offers the funds of its own volition; it is doubtful that a state could compel the federal government to provide such funds for its use. The federal funding system is, in essence, one of a voluntary cooperative effort between two governments to provide needed services for their citizens The federal government supplies funding, while the state government plans and administers the programs. This cooperative venture is not based upon those rights and duties of an obligatory nature, enforceable in a court of law, which characterize a contractual relationship.

The agreements with the federal government pursuant to which these funds were granted, even if they were to be considered contracts, are not impaired as long as the funds received are used within the conditions set. As we have said above, the General Assembly can not be assumed to be diverting the funds. It is merely exercising its appropriation power within the purposes of the federal grants.

As to "contracts" with sub-grantees or private individuals, any such contracts made by the executive are subject to the appropriations power of the General Assembly. The law is read into all contracts as a part of its terms and conditions. *Home Building and Loan Association v. Blaisdell,* 290 U.S. 398, 78 L.Ed. 413, 54 S.Ct. 231 (1934). Inherent in any contract with a government is the condition that the government cannot spend money absent an appropriation. Contracts involving federal funds stand on a footing no different from those relying entirely on state monies.

A state is precluded from adopting as a policy the destruction of contracts, but is not prohibited from exercising its sovereign power for legitimate motives even if in so

doing it interferes with existing contracts. *El Paso v. Simmons,* 379 U.S. 497, 13 L.Ed. 2d 446, 85 S.Ct. 577 (1965); *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 78 L.Ed. 413, 54 S.Ct. 231 (1934); *DePaul v. Kauffman,* 441 Pa. 386, 272 A.2d 500 (1971).

The right of the General Assembly to appropriate funds from the State Treasury is expressly mandated by our Constitution itself. In the federal system the state retains its sovereign power over spending within the state, and under our Pennsylvania Constitution this sovereign power is to be exercised by the Legislature. Acts 117 and 17-A are valid legislation appropriate to the General Assembly's constitutional authority and were enacted for the purposes of exercising that authority most efficiently. If any contracts have thereby been impaired, that result is not prohibited if incidental to a state's exercise of sovereign power.

Appellants' last contention is that the General Assembly is not properly an intervening party to this action because the intention to intervene was never formally expressed through a joint resolution.

Appellants rely on a quote from Professor Sutherland to the effect that "A legislative body expresses its corporate will only by statute or resolution. . . ." Sutherland, Statutory Construction §12.44, p. 322 (4th Ed. 1972). They conclude from this that a Joint Resolution was necessary before the General Assembly could have been held to have expressed its corporate will to intervene.

This argument is strained beyond the limits of logic. Professor Sutherland was writing in regard to the authorization of investigating committees, and the quoted language referred to the proper means of delegating the power to determine facts upon which legislation may be based.

When the legislature delegates to a committee a power related to its legislative function, it may do so only through appropriate authorization setting adequate standards and guidelines. *Commonwealth v. Cherney,* 454 Pa. 285, 312 A.2d 38 (1973); *Penna. Human Relations Commission v. Chester School District,* 427 Pa. 157, 233 A.2d 290 (1967); *Annenberg v. Roberts,* 333 Pa. 203, 2 A.2d 612 (1938). Otherwise, the legislature abrogates its direct responsibility to the electorate and removes itself from accountability to the people.

The instant action, however, is wholly collateral to the legislative function. Although the General Assembly cannot delegate its legislative powers except within narrow confines, the management of its internal affairs is a matter left to its own discretion. There is no constitutional restriction upon delegation of affairs strictly internal.

The leadership of the General Assembly—the President and the President Pro Tempore of the Senate, and the Speaker and Majority Leader of the House—signed a written authorization to a law firm to represent them in this action. The firm petitioned the Commonwealth Court for permission to intervene. This permission was granted in an opinion and order by President Judge Bowman, which we now affirm.

The General Assembly, like any corporate body, must manage its internal affairs through its leadership. It would be virtually impossible for each and every member to participate in the daily decisions which must be made regarding administrative details outside the legislative function, particularly when so many matters of legislative import which *cannot* be delegated demand their time and attention. The letter from the leadership of the General Assembly is

sufficient authorization by that body in a matter which does not require formal delegation of legislative power.

Similarly, any corporate body may ratify action taken by its leadership either expressly or impliedly, even if proper authorization was originally lacking. The petition to intervene was filed on behalf of the General Assembly on July 9, 1976. Intervention was not finally permitted until the Order of October 18, 1976, and numerous petitions and appeals have ensued. It seems safe to assume, absent any word of dissent from the General Assembly in the interval of almost two years since the application for intervention was filed, that the General Assembly is satisfied with the action taken by its leadership and has impliedly ratified its intervention. Again, although an implied ratification would be impermissible as to any of its legislative functions, the General Assembly stands as any other corporate body as to those matters solely internal and not subject to Constitutional prohibitions.

The General Assembly's attorneys were retained by its leadership and paid from contingency funds appropriated to the legislature's leadership for incidental expenses, including "professional services." Retention of outside counsel may plainly be included as a legitimate expense in the category of professional services absent some showing to the contrary. Funds allocated by the General Assembly to its leadership for contingent expenses are a matter of internal management, and absent allegations by the General Assembly itself that its leadership exceeded its authority, we cannot find fault with an expenditure that appears in all ways valid.

In reality, the action taken by the legislative leaders was to defend the constitutionality of Acts which have been

adopted by the General Assembly. Surely, the defense of legislation adopted by the General Assembly must be within the authority of its elected leaders.

We find the enactment of Acts 117 and 17-A of 1976 to be a valid exercise of the General Assembly's Constitutional appropriation's power and within the spirit and intent of the Constitutions of both the United States and Pennsylvania. Accordingly, we affirm the orders of the Commonwealth Court.

Former Chief Justice Jones did not participate in the consideration or decision of this case.

Mr. Justice Pomeroy concurs in the result.

Mr. Justice Roberts filed a dissenting opinion in which Mr. Justice O'Brien joins.

IN THE SUPREME COURT OF PENNSYLVANIA

Eastern District

No. 214 January Term, 1977

Milton J. Shapp, Governor, et al.,

Appellants

v.

Grace M. Sloan, State Treasurer,

and

The General Assembly of the Commonwealth of Pennsylvania

No. 586 January Term, 1976

Milton J. Shapp, Governor, et al.,

v.

Grace M. Sloan, State Treasurer,

and

The General Assembly of the Commonwealth of Pennsylvania

Appellant

No. 4 January Term, 1977

Milton J. Shapp, Governor, et al.,

Appellants

v.

Grace M. Sloan, State Treasurer,

and

The General Assembly of the Commonwealth of Pennsylvania

Appeal from the Final Order of the Commonwealth Court of Pennsylvania at No. 1194 C. D. 1976 and Cross-Appeals from the Commonwealth Court's Order dated July 15, 1975.

DISSENTING OPINION

ROBERTS, J. Filed: Jul 19 1978:

I dissent from the majority's holding that Acts 117[1] and 17-A[2] prevent the executive authority of Pennsylvania from using funds which the Law Enforcement Assistance Administration (LEAA) granted the Commonwealth to fund the Office of the Pennsylvania Special Prosecutor. I must also express my disagreement with the majority's

[1] Act of June 29, 1976, P.L. 469, §§1 et seq., 72 P.S. §§4611 et seq. (Supp. 1978). This bill was introduced by Senator Cianfrani.

[2] Federal Augmentation Appropriation Act of 1976, Act of July 1, 1976, P.L. 1383, §§1 et seq.

assertions that a letter written by two members of the General Assembly and the Lieutenant Governor constitutes legislative action authorizing attorneys which those individual members have retained to seek intervention in this case on behalf of the entire General Assembly.

I.

A.

Acts 117 and 17-A must be interpreted so that they do not conflict with a federal statute. Any other interpretation is unconstitutional under the Supremacy Clause. U.S. Const. art. VI. Congress intended that the LEAA funds granted to Pennsylvania to fund the Office of the Special Prosecutor be controlled solely by the executive authority of Pennsylvania and not by the Legislature. See Omnibus Safe Streets and Crime Control Act of 1968, P.L. 90-351, 82 Stat. 197, as amended, 42 U.S.C. §3701 et seq. (1970 & Supp.), discussed infra. Therefore, Act 117 may not be interpreted, as the majority erroneously interprets it, to permit the Legislature to cut off federal funding of the Office of Special Prosecutor. So too Act 17-A may not be interpreted, as the majority interprets it, actually to cut off these funds. I am unwilling to attribute to Acts 117 and 17-A the unconstitutional mission of denying to the state executive authority Federal funds which the Congress has placed within the control of the executive. See Statutory Construction Act, 1 Pa. C.S.A. §1922(3) (Supp. 1978); *Sweet v. P.L.R.B.*, 457 Pa. 456, 462, 322 A.2d 362, 366 (1974) (Roberts, J. joined by Nix, J., concurring).

The majority asserts that there is no reason to believe Congress intended to give sole control of LEAA

funds to the executive branch of state government. Congress, however, made the contrary intent perfectly clear in the Omnibus Safe Streets and Crime Control Act of 1968, P.L. 90-351, 82 Stat. 197, as amended, 42 U.S.C. §§3701 et seq. (1970 & Supp.). Section 203(a), 42 U.S.C. §3723(a), provides that funds will be granted to a State planning agency which "shall be created or designated by the chief executive of the State or by State law and shall be subject to the jurisdiction of the chief executive."

With the aid of federal funds, this executive department planning agency is to develop a State plan to improve law enforcement in the state. Omnibus Crime Control Act, §§301, 303, 42 U.S.C. §§3721, 3733. Pursuant to the State plan, state and local law enforcement officials and agencies are to receive and send these funds. Id. §§303, 304, 42 U.S.C. §§3733, 3734. Congress thus made clear that funds which it has appropriated to the LEAA for improving state law enforcement are to be spent under plans designed and operated by the executive branch of state government, whose task it is to enforce the law.

It was not until the fall of 1976, after Acts 117 and 17-A denied funding to the Pennsylvania Special Prosecutor's Office that Congress gave state legislatures a role in designing and approving State plans for LEAA assistance. Even then, Congress made the role of state legislatures purely advisory to the executive branch. Act of October 15, 1976, P.L. 94-503, §108, 90 Stat. 2411, 42 U.S.C. §3726.

In determining that State executive officers should retain control of projects funded by LEAA block grants under the Omnibus Crime Control Act, Congress was by no means limiting any "undoubted attribute of state

sovereignty." *National League of Cities v. Usery*, 426 U.S. 833, 845, 96 S.Ct. 2465, 2471 (1976). The Act simply gives control of federal funds, granted for use in law enforcement, to the executive branch of state government. This Congressional decision recognizes that the executive branch traditionally has the greatest expertise and experience in the law enforcement field. The Act does not purport to impose any particular plan of law enforcement upon an unwilling state. Section 518(a) specifically disavows any federal authority to usurp state police functions. 42 U.S.C. §3766(a).

The Legislature's action, which prevented use of federal funds granted to run the Office of the Special Prosecutor, established under Pennsylvania's LEAA plan, violates the Congressional plan to aid state executive authorities in promoting the effective administration and enforcement of the criminal law. Neither the state legislature nor the state courts may alter the Congressional decision to give the executive branch control over these federal funds. Neither may the Legislature prevent the state executive from using federal funds for the purpose for which they were granted to the state by Congress and the LEAA. Acts 117 and 17-A, as applied by the majority, violate the express provisions of the Omnibus Crime Control and Safe Streets Act. Such an interpretation makes Acts 117 and 17-A unconstitutional under the Supremacy Clause, U.S. Const. art. VI. I would therefore interpret Act 117 so as not to give the Legislature control of those federal funds which Congress has appropriated to the exclusive control of the executive branch of state government, and would interpret Act 17-A so as to permit the executive branch to continue to receive and use LEAA funds.

When a state receives federal funds granted to it for a specific purpose, as here, for the Office of the Special Prosecutor, and then, as the majority permits, withholds these funds from that purpose, it must be apparent that the state is in violation of its governmental trusteeship of the granted funds. Here the executive has always sought, prior to and during this long-delayed litigation, to use these funds for the Office of the Special Prosecutor in accordance with the terms of the Congressional mandate and the LEAA grant. Acts 117 and 17-A, as interpreted by the majority, may not serve as the basis for withholding the federal funds granted and received by the state for the Office of the Special Prosecutor.

B.

The majority's interpretation of Acts 117 and 17-A not only offends the Supremacy Clause of the United State Constitution, and makes those acts unconstitutional, but the majority's application of these acts to withhold federal funds granted to the executive for the Office of the Special Prosecutor also violates the separation of powers doctrine as this Court has applied it to Pennsylvania government. The Special Prosecutor directed the work of the 1974 Special Investigating Grand Jury probing allegations of political and official corruption in Philadelphia. Acts 117 and 17-A, as applied by the Commonwealth Court and the majority, permit the legislative branch to curtail an investigation lawfully directed by the executive under the guidance of the judiciary. This Court has held that the Legislature may not, consistent with the Pennsylvania scheme of separation of powers, by statute deny a district attorney and a legally constituted investigating Grand Jury the power to continue its investigation. *Dauphin County Grand Jury Investigation Proceedings (No. 2)*, 332 Pa. 342, 348-58, 2 A.2d 802, 804-09 (1938).

By interpreting Acts 117 and 17-A to cut off federal funds to the Special Prosecutor, the majority allows the Legislature indirectly, through power over the purse, to stifle an investigation, which the Legislature may not do directly. Id. At the time of argument concerning the application for an injunction pending appeal in this case, November, 1976, employees of the Special Prosecutor's Office had worked for two months without compensation.[3] The number of active investigations had dropped from nineteen to four. The staff could not continue to work without pay indefinitely, and eventually Acts 117 and 17-A, as interpreted by the Commonwealth Court and the majority, resulted in the demise of that Office and the end of its investigations. There is in reality no legally comprehensible distinction between an act of the Legislature specifically terminating an investigation begun by a prosecutor and a Grand Jury, *Dauphin County Grand Jury Investigation Proceedings (No. 2)*, supra, and an act that, as here, is interpreted to shut off all funding to the Special Prosecutor and to end the functional life of the investigating Grand Jury. Either approach infringes upon those functions reserved to the executive and the judiciary. Cf. *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 274 A.2d 193 (1971) (Courts must be funded to allow them to carry out their constitutional duties). Here, of course, no state funds were provided the Special Prosecutor, and federal funds granted by LEAA were withheld.

---

[3] During this time, the staff of the Special Prosecutor shrank from 43 to 17.

Interpreting Acts 117 and 17-A in a manner which ends the ability of a Grand Jury to function ignores "the grand jury's . . . special role in insuring fair and effective law enforcement. . . . The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged." *Calandra v. United States,* 414 U.S. 338, 343-44, 94 S.Ct. 613, 617-18 (1974). The Grand Jury's investigative power may not be limited or, as here, terminated by legislation which is interpreted to withhold allocated federal funds. See 42 U.S.C. §§3733, 3734. Nor will our Constitution tolerate the refusal to provide state funds to this vital arm of law enforcement. Cf. *Commonwealth ex rel. Carroll v. Tate,* supra.

II.

The majority's notion that the General Assembly may properly intervene as a party to this litigation is unsupported both factually and legally. The Assembly neither passed a resolution directing its officers to request intervention in this litigation, nor a statute or resolution authorizing any of its officers to request intervention or otherwise participate in lawsuits. Moreover, the General Assembly has passed no legislation authorizing the expenditure of funds for payment of counsel fees. If anything is certain in the legislative process, it is that a legislative body expresses its official views by enacting statutes or adopting resolutions. See generally, Pa. Const. art. II, §§1, 9.

Ernest P. Kline, President of the Senate and Lieutenant Governor, Martin L. Murray, President pro tempore of the Senate, and Herbert Fineman, then Speaker of the House, are the only three of the General Assembly membership who have expressed any desire for the Legislature to intervene in this litigation. They did so in a letter to a law firm, whom they purported to engage as counsel for the General Assembly. These three officers can not speak or act for the General Assembly without legislative authorization to do so. The signatories to this letter are elected pursuant to the Pennsylvania Constitution and constitutionally exercise only those duties the Assembly delegates to them. Pa. Const. art. II, §9; art. III, §17. The authority to seek intervention in this or any other litigation has not been delegated to these officers. The General Assembly therefore cannot be a party to this litigation.

This view does not impermissibly involve a judicial intrusion into the internal affairs of the Legislature. See *Sweeny v. Tucker,* 473 Pa. 493, 375 A.2d 698 (1977). Indeed, it protects the Legislature and enables it, as it chooses, to act as a body or through those officers to whom it has delegated its authority, without fear that unauthorized individuals will attempt to usurp its functions.

III.

It is indeed regrettable that the majority, by misconstruing and misapplying Acts 117 and 17-A frustrates the important work of the 1974 Special Investigating Grand Jury and stultifies the functioning of both the executive and judicial branches of our government in the enforcement of the criminal law. It is equally regrettable that the majority chooses to ignore the careful and clear Congressional plan for aiding state law enforcement authorities and to withhold federal funds allocated for that purpose. In so withholding these funds, and in refusing to provide

for payment of state funds, the majority most unwisely makes this, or any other, investigating grand jury depend upon the will of those with power over the purse.

"The very genius of our tripartite Government is based upon the proper exercise of their respective powers together with harmonious cooperation between the three independent Branches. . . . However, if this cooperation breaks down, the Judiciary must exercise its inherent power to preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed." *Commonwealth ex rel. Carroll v. Tate,* 442 Pa. 45, 53, 274 A.2d 193, 197 (1971) (citations omitted). At this late stage in our understanding of the needs, functions, and obligations of our co-equal branches of government, a decision approving a doctrine of fiscal power without accountability over so crucial a part of the administration of criminal justice can only be viewed with concern. Moreover, it is a decision which, when implemented in the manner reflected on this record, invites public disrespect.

The Commonwealth Court order, dated October 5, 1976, denying the office of Special Prosecutor federal funds allocated for its operation had the practical effect of closing down the Office. What the record plainly reveals is that without federal funds, the Office of Special Prosecutor became inoperative and incapable of performing its vital prosecutorial function, despite the efforts and dedication of prosecutors and staff who remained and worked for several weeks, and, in some instances, months, without being paid. Without the Special Prosecutor the investigating Grand Jury became ineffective and lifeless. Without an active and functioning

Grand Jury, the investigation into political and governmental corruption came to an abrupt halt.

Viewed pragmatically, the majority's affirmance today of the Commonwealth Court order represents an exercise in futility. Both the Special Prosecutor and Grand Jury have been functionally nonexistent since late 1976. During the intervening months, the majority failed to disturb that order. See *Shapp v. Sloan,* No. 586 January Term, 1976 (Pa. Nov. 23, 1976) (Roberts, J., and Pomeroy, J., dissenting) (order denying injunction pending appeal).

One can only hope that in the near future, in another setting, the majority will change its view and adopt an approach more in harmony with today's enhanced public interest in the prompt and effective investigation of political and government corruption.

I dissent.

Mr. Justice O'Brien joins in this dissenting opinion.

SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 586 January Term, 1976
Nos. 4 & 214 January Term, 1977
(Commonwealth Court No. 1194 C.D. 1976)

Milton J. Shapp, Governor, Robert P. Kane, Attorney General, John C. Pittinger, Secretary of Education, William H. Sherlock, Secretary of Transportation, Leonard Bachman, M.D., Secretary of Health, Raymond E. Kerstetter, Secretary of Agriculture, Maurice K. Goddard, Secretary of Environmental Resources, Governor's Justice Commission

v.

Grace M. Sloan, State Treasurer

APPEAL OF: GENERAL ASSEMBLY OF PENNSYLVANIA

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the COMMONWEALTH COURT OF PENNSYLVANIA, be, and the same is hereby AFFIRMED.

By the Court,
Sally Mrvos
Sally Mrvos, Esquire
Prothonotary

Dated: July 19, 1978

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth Court Docket:
No. 1194 C.D. 1976

Supreme Court Docket:
No. 214 January Term, 1977

Milton J. Shapp, Governor, et al.,
Petitioners,

v.

Grace M. Sloan, State Treasurer
Respondent,

and

The General Assembly of the Commonwealth of Pennsylvania,
Intervening Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, notice is hereby given that MILTON J. SHAPP, Governor, ROBERT P. KANE, by his successor in office GERALD CORNISH, Acting Attorney General, JOHN C. PITTENGER, by his successor

in office CARYL M. KLINE, Secretary of Education, WILLIAM H. SHERLOCK, by his successor in office GEORGE S. PULAKOS, Secretary of Transportation, LEONARD BACHMAN, M.D., Secretary of Health, RAYMOND E. KERSTETTER, by his successor in office KENT D. SHELHAMER, Secretary of Agriculture, MAURICE K. GODDARD, Secretary of Environmental Resources and the GOVERNOR'S JUSTICE COMMISSION hereby appeal to the Supreme Court of the United States from that portion of the opinion and final judgment entered on July 19, 1978 by the Supreme Court of Pennsylvania upholding the constitutionality of Act 117 of 1976, 72 P.S. §§4611 et seq., and Act 17-A of 1976 (The Federal Augmentation Appropriation Act of 1976).

This appeal is taken pursuant to 28 U.S.C. §1257-(2).

Dated: August 16, 1978.

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CERTIFICATE OF SERVICE

I, MELVIN R. SHUSTER, Special Deputy Attorney General, hereby certify that I have caused a true and correct copy of the foregoing Notice of Appeal to be served on all counsel of record by depositing same in the United States Mail, first-class postage prepaid, addressed as follows:

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State Treasurer

Dated: August 16, 1978

Melvin R. Shuster
Melvin R. Shuster
Special Deputy Attorney General Attorney for Appellants

Supreme Court, U. S.
FILED
NOV 15 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 78-642

MILTON J. SHAPP, Governor; GERALD GORNISH, Acting Attorney General; CARYL M. KLINE, Secretary of Education; GEORGE S. PULAKOS, Secretary of Transportation; LEONARD BACHMAN, M.D., Secretary of Health; KENT D. SHELHAMER, Secretary of Agriculture; MAURICE K. GODDARD, Secretary of Environmental Resources, and the GOVERNOR'S JUSTICE COMMISSION,

Appellants

v.

ROBERT E. CASEY, State Treasurer
and
THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellees

On Appeal From the Supreme Court of Pennsylvania

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

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SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

[PREFATORY NOTE: The dissenting opinion of Mr. Justice Roberts as reproduced below supersedes the dissenting opinion appearing at pages 29a-39a of the appendix to the jurisdictional statement.

Footnote 3, appearing below at page 49a, was inadvertently omitted from the original version. On page 52a, the footnote appearing thereon has been renumbered accordingly.]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 214 January Term, 1977

Milton J. Shapp, Governor, et al.,
Appellants

v.

Grace M. Sloan, State Treasurer,

and

The General Assembly of the Commonwealth of Pennsylvania

No. 586 January Term, 1976

Milton J. Shapp, Governor, et al.,

v.

Grace M. Sloan, State Treasurer,

and

The General Assembly of the Commonwealth of Pennsylvania

Appellant

No. 4 January Term, 1977

Milton J. Shapp, Governor, et al.,

Appellants

v.

Grace M. Sloan, State Treasurer,

and

The General Assembly of the Commonwealth of Pennsylvania

Appeal from the Final Order of the Commonwealth Court of Pennsylvania at No. 1194 C.D. 1976 and Cross-Appeals from the Commonwealth Court's Order dated July 15, 1975.

DISSENTING OPINION

ROBERTS, J. Filed: Jul 19 1978:

I dissent from the majority's holding that Acts 117[1] and 17-A[2] prevent the executive authority of Pennsylvania from using funds which the Law Enforcement Assistance Administration (LEAA) granted the Commonwealth to fund the Office of the Pennsylvania Special Prosecutor. I must also express my disagreement with the majority's assertions that a letter written by two members of the General Assembly and the Lieutenant Governor constitutes legislative action authorizing attorneys which those individual members have retained to seek intervention in this case on behalf of the entire General Assembly.

I.

A.

Acts 117 and 17-A must be interpreted so that they do not conflict with a federal statute. Any other interpretation is unconstitutional under the Supremacy Clause. U.S. Const. art. VI. Congress intended that the LEAA funds granted to Pennsylvania to fund the Office of the Special Prosecution be controlled solely by the executive authority of Pennsylvania and not by the Legislature. See Omnibus Safe Streets and Crime Control Act of 1968, P.L. 90-351, 82 Stat. 197, as amended, 42 U.S.C. §3701

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[1] Act of June 29, 1976, P.L. 469, §§1 et seq., 72 P.S. §§4611 et seq. (Supp. 1978). This bill was introduced by Senator Cianfrani.

[2] Federal Augmentation Appropriation Act of 1976, Act of July 1, 1976, P.L. 1383, §§ 1 et seq.

et seq. (1970 & Supp.), discussed infra. Therefore, Act 117 may not be interpreted, as the majority erroneously interprets it, to permit the Legislature to cut off federal funding of the Office of Special Prosecutor. So too Act 17-A may not be interpreted, as the majority interprets it, actually to cut off these funds. I am unwilling to attribute to Acts 117 and 17-A the unconstitutional mission of denying to the state executive authority Federal funds which the Congress has placed within the control of the executive. See Statutory Construction Act, 1 Pa. C.S.A. §1922(3) (Supp. 1978); *Sweet v. P.L.R.B.*, 457 Pa. 456, 462, 322 A.2d 362, 366 (1974) (Roberts, J. joined by Nix, J., concurring).

The majority asserts that there is no reason to believe Congress intended to give sole control of LEAA funds to the executive branch of state government. Congress, however, made the contrary intent perfectly clear in the Omnibus Safe Streets and Crime Control Act of 1968, P.L. 90-351, 82 Stat. 197, as amended, 42 U.S.C. §§3701 et seq. (1970 & Supp.). Section 203(a), 42 U.S.C. §3723(a), provides that funds will be granted to a State planning agency which "shall be created or designated by the chief executive of the State or by State law and shall be subject to the jurisdiction of the chief executive."

With the aid of federal funds, this executive department planning agency is to develop a State plan to improve law enforcement in the state. Omnibus Crime Control Act, §§301, 303, 42 U.S.C. §§3721, 3733. Pursuant to the State plan, state and local law enforcement officials and agencies are to receive and spend these funds. Id. §§303, 304, 42 U.S.C. §§3733, 3734. Congress thus made clear that funds which it has appropriated

to the LEAA for improving state law enforcement are to be spent under plans designed and operated by the executive branch of state government, whose task it is to enforce the law.[3]

It was not until the fall of 1976, after Acts 117 and 17-A denied funding to the Pennsylvania Special Prosecutor's Office that Congress gave state legislatures a role in designing and approving State plans for LEAA assistance. Even then, Congress made the role of state legislatures purely advisory to the executive branch. Act of October 15, 1976, P.L. 94-503, §108, 90 Stat. 2411, 42 U.S.C. §3726.

In determining that State executive officers should retain control of projects funded by LEAA block grants under the Omnibus Crime Control Act, Congress was by no means limiting any "undoubted attribute of state sovereignty." *National League of Cities v. Usery*, 426 U.S. 833, 845, 96 S.Ct. 2465, 2471 (1976). The Act simply gives control of federal funds, granted for use in law enforcement, to the executive branch of state gov-

---

[3] By contrast, for example, the Elementary and Secondary Education Act of 1965, Act of April 11, 1965, P.L. 89-10, §§2 et seq., 79 Stat. 28, as amended, 20 U.S.C. §§241c et seq. (1970 & Supps.) (ESEA), provides that monies shall be granted to a "State," or a "State educational agency," 20 U.S.C. §241g(a)(1), without specifying which branch or branches of state government should supervise activities funded by ESEA or the agency which directs the activities. In *Wheeler v. Barrera*, 417 U. S. 402, 416-17, 94 S.Ct. 2274, 2283 (1974), the Supreme Court held that the ESEA "evinces a clear intention that state constitutional spending provisions not be pre-empted . . . ." The reasoning of *Wheeler* applies with equal force to state statutory proscriptions on spending.

ernment. This Congressional decision recognizes that the executive branch traditionally has the greatest expertise and experience in the law enforcement field. The Act does not purport to impose any particular plan of law enforcement upon an unwilling state. Section 518(a) specifically disavows any federal authority to usurp state police functions. 42 U.S.C. §3766(a).

The Legislature's action, which prevented use of federal funds granted to run the Office of the Special Prosecutor, established under Pennsylvania's LEAA plan, violates the Congressional plan to aid state executive authorities in promoting the effective administration and enforcement of the criminal law. Neither the state legislature nor the state courts may alter the Congressional decision to give the executive branch control over these federal funds. Neither may the Legislature prevent the state executive from using federal funds for the purpose for which they were granted to the state by Congress and the LEAA. Acts 117 and 17-A, as applied by the majority, violate the express provisions of the Omnibus Crime Control and Safe Streets Act. Such an interpretation makes Acts 117 and 17-A unconstitutional under the Supremacy Clause, U.S. Const. art. VI. I would therefore interpret Act 117 so as not to give the Legislature control of those federal funds which Congress has appropriated to the exclusive control of the executive branch of state government, and would interpret Act 17-A so as to permit the executive branch to continue to receive and use LEAA funds.

When a state receives federal funds granted to it for a specific purpose, as here, for the Office of the Special Prosecutor, and then, as the majority permits, withholds these funds from that purpose, it must be apparent that the state is in violation of its governmental trusteeship of the granted funds. Here the executive has always sought, prior to and during this long-delayed litigation, to use these funds for the Office of the Special Prosecutor in accordance with the terms of the Congressional mandate and the LEAA grant. Acts 117 and 17-A, as interpreted by the majority, may not serve as the basis for withholding the federal funds granted and received by the state for the Office of the Special Prosecutor.

B.

The majority's interpretation of Acts 117 and 17-A not only offends the Supremacy Clause of the United States Constitution, and makes those acts unconstitutional, but the majority's application of these acts to withhold federal funds granted to the executive for the Office of the Special Prosecutor also violates the separation of powers doctrine as this Court has applied it to Pennsylvania government. The Special Prosecutor directed the work of the 1974 Special Investigating Grand Jury probing allegations of political and official corruption in Philadelphia. Acts 117 and 17-A, as applied by the Commonwealth Court and the majority, permit the legislative branch to curtail an investigation lawfully directly by the executive under the guidance of the judiciary. This Court has held that the Legislature may not, consistent with the Pennsylvania scheme of separation of powers, by statute deny a district attorney and a legally constituted investigating Grand Jury the power to continue its investigation. *Dauphin County Grand Jury Investigation Proceedings (No. 2)*, 332 Pa. 342, 348-58, 2 A.2d 802, 804-09 (1938).

By interpreting Acts 117 and 17-A to cut off federal funds to the Special Prosecutor, the majority allows the Legislature indirectly, through power over the purse, to stifle an investigation, which the Legislature may not do directly. Id. At the time of argument concerning the application for an injunction pending appeal in this case, November, 1976, employees of the Special Prosecutor's Office had worked for two months without compensation.[4] The number of active investigations had dropped from nineteen to four. The staff could not continue to work without pay indefinitely, and eventually Acts 117 and 17-A, as interpreted by the Commonwealth Court and the majority, resulted in the demise of that Office and the end of its investigations. There is in reality no legally comprehensible distinction between an act of the Legislature specifically terminating an investigation begun by a prosecutor and a Grand Jury, *Dauphin County Grand Jury Investigation Proceedings (No. 2)*, supra, and an act that, as here, is interpreted to shut off all funding to the Special Prosecutor and to end the functional life of the investigating Grand Jury. Either approach infringes upon those functions reserved to the executive and the judiciary. Cf. *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 274 A.2d 193 (1971) (Courts must be funded to allow them to carry out their constitutional duties). Here, of course, no state funds were provided the Special Prosecutor, and federal funds granted by LEAA were withheld.

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One can only hope that in the near future, in another setting, the majority will change its view and adopt an approach more in harmony with today's enhanced public interest in the prompt and effective investigation of political and governmental corruption.

I dissent.

Mr. Justice O'Brien joins in this dissenting opinion.

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IN THE

Supreme Court of the United States

No. 78-642.

MILTON J. SHAPP, Governor; GERALD GORNISH, Acting Attorney General; CARYL M. KLINE, Secretary of Education; GEORGE S. PULAKOS, Secretary of Transportation; LEONARD BACHMAN, M.D., Secretary of Health; KENT D. SHELHAMER, Secretary of Agriculture; MAURICE K. GODDARD, Secretary of Environmental Resources, and THE GOVERNOR'S JUSTICE COMMISSION,

Appellants,

v.

ROBERT E. CASEY, State Treasurer

and

THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSLYVANIA,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION OF APPELLEE, THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, TO DISMISS OR AFFIRM.

The appellee, The General Assembly of the Commonwealth of Pennsylvania, respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania on the ground that the question raised by Appellants is not sufficiently substantial to warrant further proceedings.

CONSTITUTIONAL PROVISIONS INVOLVED.

Article VI, clause 2 of the Constitution of the United States and article III, section 24 of the Pennsylvania Constitution are set forth in Appellants' Jurisdictional Statement, at p. 5. They need not be repeated herein.

Article IV, section 4 of the Constitution of the United States provides:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion and an Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

Amendment X of the Constitution of the United States provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS INVOLVED.

The state statutes involved in this case, Act 117 of 1976, 72 P. S. §§ 4611-4617 (Supp. 1978), and the Federal Augmentation Act of 1976, No. 17-A, 1976 Pa. Laws 1383, are set forth in Appellants' Jurisdictional Statement, at pp. 6-7. They need not be repeated herein.

COUNTERSTATEMENT OF QUESTION PRESENTED.

I. Where acts of Congress grant federal augmentation funds to the states for use in state programs and a state's Constitution provides that no money paid into the state treasury shall be disbursed except on appropriations made by law, are state enactments requiring and specifying legislative appropriations of federal augmentation funds valid under the Supremacy Clause of the United States Constitution?

COUNTERSTATEMENT OF THE CASE.

This appeal questions the validity of Pennsylvania Acts 117 and 17-A of 1976 under the Supremacy Clause of the United States Constitution, article VI, clause 2.

Act 117 of 1976, 72 P. S. §§ 4611-4617, provides that both federal augmentation grants [1] to the Commonwealth and state matching funds shall be paid out of the state treasury only upon specific appropriations by the General Assembly. The Federal Augmentation Act of 1976, No. 17-A, 1976 Pa. Laws 1383, sets forth, in specific line accounts, appropriations for fiscal year 1976-77 of monies in the state treasury derived from Federal augmentation funds.

This legislation was enacted upon the recommendations of the Pennsylvania Economy League to the Governor and the General Assembly,[2] and in response to numerous abuses by the Executive Branch in the use of federal augmentation funds.[3]

---

1. Federal "augmentation grants" or "augmentation funds" are simply federal monies given to the states for use in *state* programs. They are to be distinguished from federal funds which flow through the states for the funding of *federal* programs.

2. "Fiscal Planning, Legislation and Implementation for Pennsylvania," report II, Executive Budget Process in Pennsylvania, at p. 57; report III, Legislative Budget Process in Pennsylvania, at p. 4, quoted by the Senate majority leader, Mr. Irvis, during debate on Senate Bill 1542 (Act 117), June 16, 1976.

3. For example, after the General Assembly became concerned over the increasing size of the Central Office staff of the Drug and Alcohol Abuse Council and made cutbacks in its budget from non-federal funds, the agency subverted the legislative intent by reallocating federal augmentation funds from the already financially-strapped field programs for the treatment of drug and alcohol

The Executive Branch challenged Acts 117 and 17-A on state and federal constitutional grounds in the Commonwealth Court of Pennsylvania, which unanimously upheld the legislature's constitutional right to control the spending of federal augmentation funds. *Shapp v. Sloan*, 27 Pa. Cmwlth. 312, 367 A. 2d 791 (1976).

In affirming that decision, the Supreme Court of Pennsylvania explicitly rejected the Executive's contention that Acts 117 and 17-A violated the Supremacy Clause of the United States Constitution:

> "Appellants [the Executive Branch] have reiterated throughout their brief that it is federal policy to allow state governments as much control as possible over these federally funded programs. It cannot, therefore, be considered an encroachment upon federal supremacy that the legislature, rather than the executive, exercises the discretion granted the state government by the Congress." *Shapp v. Sloan*, No. 214, January Term, 1977 (July 19, 1978), slip opinion, at p. 21 (21a).

Appellants seek review of that decision by this Court. As set forth in the Argument below, The General Assembly of Pennsylvania respectfully submits that the decision of the Pennsylvania Supreme Court was correct and the appeal should be dismissed for failure to raise a substantial question.

In the alternative, The General Assembly respectfully moves Your Honorable Court to affirm the judgment of the Pennsylvania Supreme Court without additional briefing or argument.

---

3. (Cont'd.)
addicts back to the Central Office so that the cutbacks could be circumvented. Answer of Intervenors, The General Assembly of the Commonwealth of Pennsylvania, to the Petition for Review of Governor Milton J. Shapp, *et al.*, at pp. 7-8.

ARGUMENT.

The Case Presents No Substantial Question Not Previously Resolved in Appellees' Favor by This Court.

This Court has repeatedly held that

> "[t]he exercise of federal supremacy is not lightly to be presumed." *New York State Dept. of Social Services v. Dublino*, 413 U. S. 405, 413 (1973), quoting *Schwartz v. Texas*, 344 U. S. 199, 202-203 (1952).

Only where the conflict between a state and federal enactment is

> "so direct and positive that the two acts cannot be reconciled or stand together," (*Missouri, Kansas and Texas Railway v. Haber*, 169 U. S. 613, 623 (1898)),

will the state enactment be held to conflict with federal law. *New York State Dept. of Social Services v. Dublino, supra; Missouri, Kansas & Texas Railway v. Haber, supra; Fitzgerald v. Catherwood*, 388 F. 2d 400 (2d Cir. 1968), *cert. denied*, 391 U. S. 934 (1968).

There is no "direct and positive" conflict between state and federal law here and no need for this Court's intervention.

The decision of the Pennsylvania Supreme Court in this case sustained the state and federal constitutional right of the General Assembly to oversee the appropriation of funds in the state treasury and to assume ultimate responsibility for the coordination of the fiscal policy of the Commonwealth of Pennsylvania. That decision was clearly correct. As that court noted, the General Assembly has historically asserted and exercised some fiscal control over

federal aid funds. (8a) Act 117 and 17-A are no more than the logical and appropriate extension of that historic exercise of control now that federal monies have become an increasingly significant proportion of total monies available for expenditure in Pennsylvania.

Furthermore, not only is there no "direct and positive" conflict between Pennsylvania Acts 117 and 17-A and the federal augmentation legislation, but the Pennsylvania legislation in fact implements the federal statutory scheme.

Contrary to Appellants' assertion at page 14 of the Jurisdictional Statement, the federal augmentation legislation involved in this case provides for grants to the states for state programs to be administered in accordance with state law. The only additional strictures are requirements assuring audit integrity and a state liaison agency.[4] No exclusive role has been established for the executive branch of state government. Indeed, the congressional Advisory Commission on Intergovernmental Relations has urged state legislatures to increase their role in the spending of federal grant monies. (22a) Congress has not disapproved that recommendation. As the Pennsylvania Supreme Court noted in this case:

> "There is no evidence before us to indicate that Congress considers such state legislative involvement an encroachment upon the supremacy of the federal government." (22a)

Moreover, the recent decision of Your Honorable Court in *Wheeler v. Barrera*, 417 U. S. 402 (1974), establishes beyond question that there is no "direct and positive" conflict between the state enactments and the federal enactments at issue in the present case.

In *Wheeler v. Barrera, supra*, this Court held that federal grants to a state are subject to the state's duty and power to control its own financial well-being consonant with its constitutional requirements. It was precisely that duty and power which The General Assembly exercised in making line account appropriations of the federal augmentation funds in this case.

Wheeler dealt with Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U. S. C. A. § 241(a) *et seq.*[5] Title I provides federal funding for special programs for educationally deprived children in private as well as public schools. The Missouri Constitution prohibits the use of "public" funds in private schools. Reversing the lower court's ruling that the state constitutional proscription did not apply to federal Title I funds, this Court stated:

> "Title I evinces a clear intention that state constitutional spending proscriptions not be preempted as a condition of accepting Federal Title I funds." 417 U. S. at 417.

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4. For example, the disjunctive scheme of section 303 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U. S. C. A. §§ 4571, *et seq.*, 4573, plainly manifests the congressional intent to avoid any mandate which might run afoul of constitutional or statutory precepts governing administrative procedure, separation of powers, or delegation of powers in any state:

> "[T]he State may designate a single State agency as the sole agency for the administration of the [State] plan *or* designate such agency as the sole agency for supervising the administration of the plan. . . ." (emphasis added).

See also, Intergovernmental Personnel Act of 1970, 42 U. S. C. A. §§ 4701 *et seq.*, 4702 (full recognition of the rights, powers and responsibilities of state and local governments); Library Services and Construction Act, 1956, as amended, 20 U. S. C. A. §§ 351 *et seq.*, 351(b) (state and local initiative in the conduct of library services); Omnibus Crime Control and Safe Streets Act of 1968, 42 U. S. C. A. §§ 3701 *et seq.*, 3726 (state legislature to review state plan for "possible conflicts with State statutes or prior legislative Acts"); 3766(a) (no federal control over state or local law enforcement agencies).

5. The Pennsylvania legislation upheld in the present case specifically covers this Federal augmentation enactment. Act 17-A of 1976, 1976 Pa. Laws 1383, 1392.

This Court then went on to hold:

> "[W]hether Federal aid is money 'donated to any state fund for public school purposes,' within the meaning of the Missouri Constitution, Art. 9, § 5, is *purely a question of state* and not federal law." 417 U. S. at 418, 419. (emphasis added).

The Pennsylvania courts have considered and ruled upon the question at issue here as a question of state law, just as *Wheeler* directs. Acts 117 and 17-A have been upheld under the Pennsylvania Constitution. *Shapp v. Sloan*, 27 Pa. Cmwlth. 312, 367 A. 2d 791 (1976), *aff'd*, — Pa. —, January Term 1977, No. 214 (July 19, 1978), slip opinion (5a).

As those courts properly held, federal block grants to the Commonwealth are subject to the appropriation power of the General Assembly and may not be expended absent specific legislative appropriations:

> "The [Pennsylvania] constitution says 'no money' shall be paid without an appropriation. We think the constitution means exactly what it says." (17a)

Cf. *Opinion of the Justices*, 381 A. 2d 1204 (N. H. 1978). As the final decision of the highest court of the state construing the state constitution, that determination is conclusive and may not be disturbed by this Court on appeal. *Merchants' Bank v. Pennsylvania*, 167 U. S. 461 (1897).

Inasmuch as *Wheeler v. Barrera, supra*, has recognized that the federal monies in question are subject to state constitutional provisions, it is clear that the Pennsylvania legislation does not conflict with federal law. Therefore, as the Pennsylvania courts held, it is also valid under the Supremacy Clause of the Constitution of the United States, article VI, clause 2.

The cases cited by Appellants are not to the contrary. *MacManus v. Love*, 179 Colo. 218, 499 P. 2d 609 (1972) (cited by Appellants at p. 16 of the Jurisdictional Statement), never reached the federal constitutional validity of the state appropriations bill. That question was not even raised in *Opinion of The Justices to the Senate*, Mass. Adv. Sh. 1978, 1811, 378 N. E. 2d 433 (1978) (also cited at p. 16). Both decisions rested wholly upon interpretations of the respective state constitutional provisions.

Navajo Tribe v. Arizona Dept. of Administration, 111 Ariz. 279, 528 P. 2d 623 (1975); *State ex rel. Sego v. Kirkpatrick*, 86 N. M. 359, 524 P. 2d 975 (1974) (cited by Appellants at p. 16); *Douglas Independent School District No. 3 v. Jorgenson*, 293 F. Supp. 849 (D. S. D. 1968); and *Shepheard v. Godwin*, 280 F. Supp. 869 (E. D. Va. 1968) (cited at p. 14, n. 4) did not involve federal grants to *states*. Accordingly, those cases are not on point.[6]

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6. Other cases cited by Appellants are likewise inapplicable. The following cases involved direct conflicts between state and federal requirements in a categorical assistance program over which, unlike in the case of the block grants at issue in this case—where the states are accorded the major share of responsibility for administration (see note 3 *supra*)—the Federal Government has reserved greater control: *Townsend v. Swank*, 404 U. S. 282 (1971); *King v. Smith*, 392 U. S. 309 (1968) (cited at pp. 12-13); *Woolfolk v. Brown*, 325 F. Supp. 1162 (E. D. Va. 1971), *aff'd*, 456 F. 2d 652 (4th Cir. 1972), *cert. denied*, 409 U. S. 885 (1972) (cited at p. 14, n. 4).

Other cases cited by Appellants involved state regulation in areas which required national uniformity: *Ray v. Atlantic Richfield Co.*, — U. S. —, 98 S. Ct. 988 (1978); *Jones v. Rath Packing Co.*, 430 U. S. 519 (1977); *Hines v. Davidowitz*, 312 U. S. 52 (1941) (cited at p. 15). As already discussed (*see text* at n. 3, *supra*), the federal augmentation legislation at issue in the present case accords the states wide latitude over specific spending decisions and encourages individualized responses to what are essentially local problems. *See also*, S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] *U. S. Code Cong. & Ad. News* 2112, 2239, 2276-78.

As the Supreme Court of Pennsylvania recognized:

> "The federal government has expressly given the states a wide discretion in dealing with these [federal grant] funds. That discretion is most logically exercised by the branch of state government which is constitutionally empowered to exercise control over *all* expenditures." (23a, emphasis in original)

The decision of this Court in *Wheeler v. Barrera, supra,* confirms that the Pennsylvania Supreme Court was correct.

We respectfully submit that *Wheeler v. Barrera, supra,* is dispositive of the question raised by Appellants in the Jurisdictional Statement. Clearly, Acts 117 and 17-A of 1976 do not violate the Supremacy Clause, and no substantial question is presented.

Indeed were this result not patently correct, extremely difficult questions of federalism would arise, commencing, perhaps, with article IV, section 4 and Amendment X of the United States Constitution, leading by steps to a re-examination of the Constitutional Convention of 1787. Even if this Court were to conclude that the questions raised were manageable and not political, the federal legislation at issue clearly does not present the "direct and positive" conflict which would justify such a rigorous inquiry into justiciability, textually demonstrable commitments and ultimate powers.

CONCLUSION.

For the reasons set forth above, Appellee The General Assembly of Pennsylvania respectfully submits that the question upon which this cause depends is not sufficiently substantial to warrant further proceedings; and Appellee respectfully moves Your Honorable Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered by the Supreme Court of Pennsylvania.

Respectfully submitted,

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Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1978
No. 78-642

MILTON J. SHAPP, Governor; GERALD GORNISH, Attorney General; CARYL M. KLINE, Secretary of Education; GEORGE S. PULAKOS, Secretary of Transportation; LEONARD BACHMAN, M.D., Secretary of Health; KENT D. SHELHAMER, Secretary of Agriculture; MAURICE K. GODDARD, Secretary of Environmental Resources, and the GOVERNOR'S JUSTICE COMMISSION,
Appellants

v.

ROBERT E. CASEY, State Treasurer
and
THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,
Appellees

On Appeal From the Supreme Court of Pennsylvania

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEE, THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 78-642

MILTON J. SHAPP, Governor; GERALD GORNISH, Attorney General; CARYL M. KLINE, Secretary of Education; GEORGE S. PULAKOS, Secretary of Transportation; LEONARD BACHMAN, M.D., Secretary of Health; KENT D. SHELHAMER, Secretary of Agriculture; MAURICE K. GODDARD, Secretary of Environmental Resources, and the GOVERNOR'S JUSTICE COMMISSION,

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Appellees.

On Appeal From the Supreme Court of Pennsylvania

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEE, THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, TO DISMISS OR AFFIRM

Pursuant to Rule 16(4) of the Rules of the Supreme Court, appellants Milton J. Shapp, Governor, et al., here-

by file the within brief in opposition to the motion of appellee, the General Assembly of the Commonwealth of Pennsylvania, to dismiss or affirm the judgment entered by the Supreme Court of Pennsylvania. Appellants respectfully submit that the General Assembly has offered no argument which refutes the substantiality of the federal question raised in the Jurisdictional Statement, and that this Honorable Court should deny the motion to dismiss or affirm, note jurisdiction and entertain full briefing and oral argument on the merits.

ARGUMENT

A. This Appeal Involves Federal Programs

Under the guise of exercising control over the fiscal policy of the Commonwealth, the General Assembly, through the enactment of Acts 117 and 17-A of 1976, seeks to arrogate to itself the Executive Branch's power to determine how federal funds shall be allocated with respect to various federally-funded programs in which the Commonwealth participates. In the past, when the General Assembly purported to appropriate federal funds, the statutory language employed always was all-inclusive, providing a general allocation of all such funds received by the Commonwealth.[1] The consequence of such legislative language was not minimal fiscal control, as the General Assembly has suggested, but none at all. Indeed, the adoption of such language in 1961 in the General Appropriations Act had as much impact upon the utilization

[1] Such boiler plate phraseology was employed regularly from 1961 through 1975, as seen, for example, in section 8(b) of the General Appropriations Act of 1975, No. 8-A, 1975 Pa. Laws 650, 683:

> In addition to the amounts appropriated by this act, all moneys received from the Federal Government, or from any other source as contributions for the programs provided herein, or as payment for services or materials furnished by one institution to another, except those collections designated as revenues, shall be paid into the General Fund and are hereby appropriated out of the General Fund for the purposes of the respective appropriations.

of federal funds as the absence of such language in preceding General Appropriations Acts: executive agencies continued to use these funds to implement federally-funded programs in accordance with the provisions of the controlling federal statute.

In its counterstatement of the case,[2] the General Assembly creates a false dichotomy by categorizing federally-funded programs in the Commonwealth as either "state" or "federal", and by implying that "augmentation funds" properly fall within the legislature's appropriation power because they are utilized only in such "state" programs. Neither of the acts challenged by the Executive Branch recognizes any such distinction. Section 3 of Act 117 subjects *all* federal funds to the General Assembly's power of appropriation. Pa. Stat. Ann. tit. 72, §4613-(1a). The comprehensiveness of Act 17-A, entitled the Federal Augmentation Appropriation Act of 1976, demonstrates the General Assembly's intention to exercise this power over the entire spectrum of federally-funded programs administered by the Executive Branch. 1976 Pa. Laws 1383 et seq.

Equally invalid is the General Assembly's purported distinction between categorical grant and block grant programs as they relate to the Legislature's exercise of its appropriation power.[3] Section 5 of Act 117 expressly

[2] Motion of Appellee, the General Assembly of the Commonwealth of Pennsylvania, to Dismiss or Affirm, at 3, n. 1 .

[3] Id., at 9, n. 6. Categorical and block grant programs differ in the scope of the federal administrator's discretion to award grants, the scope of the recipient's discretion to use the grants and the nature and severity of the performance conditions attached to the grants. *See,* Advisory Commission on Intergovernmental Relations, ***Categorical Grants: Their Role and Design,***

provides that all federal funds, "whether designated as grants, augmentations, credits or otherwise . . .", shall be deposited in the General Fund and, except in specific limited circumstances, shall be appropriated by the General Assembly. Pa. Stat. Ann. tit. 72, §4615 (2a-3a). In accordance with this mandate, Act 17-A appropriated federal funds for such categorical grant programs as Medicare, Medicaid and the National Direct Student Loan Program as well as the block grant programs funded under the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C.A. §3101 et seq., and the Comprehensive Employment and Training Act, 29 U.S.C.A. §801 et seq. The latitude accorded state agencies in the administration of federally-funded programs thus bears no relation to the General Assembly's assertion of its appropriation power over these programs under Act 117.

Where Congress has intended to allow state legislatures to appropriate federal funds, it has specifically so provided. In order to qualify for revenue-sharing monies under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C.A. §1221 et seq., a state must assure the Secretary of the Treasury that: "It will provide for the expenditure of amounts received . . . only in accordance with the laws and procedures applicable to the spending of its own revenues." 31 U.S.C.A. §1243(a)(4). A similar provision governs the use of federal funds under Title II of the Local Public Works Capital Development

Washington, D. C., U. S. Government Printing Office, 1977, at 5-9. These differences are irrelevant, however, to the overriding purpose of all such programs, namely, the effectuation of Congressional policies through legislation enacted pursuant to its power under the General Welfare Clause of the Constitution, art. I, §8, cl. 1, by means of the expenditure of federal funds.

and Investment Act of 1976, 42 U.S.C.A. §§6701, 6725-(8).

None of the federal statutes relied upon by the General Assembly[4] contains any analogous provision which would empower a state legislature to treat federal monies as state monies subject to its appropriation power. Indeed, these statutes support appellants' contention that state executive agencies, not state legislatures, shall exercise control over the particular federal funds involved.

B. A Direct and Positive Conflict Exists Between State and Federal Law in This Case

---

The reading given the federal statutes at issue by the General Assembly and the court below represents a monolithic view of state government which begs the very question of which branch, executive or legislative, has been designated by Congress to determine the allocation of federal funds at the state level. The provisions of Act 117, upheld under the Pennsylvania Supreme Court's construction of article III, §24, of the Pennsylvania Constitution, accord that power to the General Assembly (13a-21a). Federal laws, to the contrary, impart this authority to the Governor or various executive officials or agencies.

For example, section 203 of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C.A. §§3701, 3723, provides that a grant to a state shall be

[4] Motion of Appellee, the General Assembly of the Commonwealth of Pennsylvania, to Dismiss or Affirm, at 6, n. 4.

utilized to establish and maintain a state planning agency which shall be subject to the jurisdiction of the chief executive of the state. The section further provides that such state planning agency shall develop a comprehensive statewide plan; define, develop and correlate programs and projects; and establish priorities. This provision of law could hardly be written with greater clarity to reflect that the grant is transmitted to the state agency under and subject to the jurisdiction of the Governor and that it is the agency which controls the plan and all expenditures thereunder.

Section 303 of the Act, 42 U.S.C.A. §3733, states that the Federal Government shall make grants to the state agency and that the comprehensive state plan shall "provide for the administration of such grants by the State planning agency." This section further provides that expenditures shall be made by such agency for the development and implementation of programs and projects in conformity with the state plan. Because this Act of Congress vests all of the powers and duties in the state planning agency and the grant is made to said agency for the specified enumerated purposes, the General Assembly is completely devoid of any power or authority over such grants.[5]

[5] Nor did the status of the General Assembly change when Congress amended the Act in 1976 to provide for an "advisory review" by the state legislature of the comprehensive plan prepared by the state planning agency. 42 U.S.C.A. §3726. The legislative history of this amendment confirms the continued control over LEAA funds to be exercised by the state planning agency. *See*, S. Rep. No. 847, 94th Cong., 2d Sess. 16, *reprinted in* [1976] U. S. Code Cong. & Ad. News 5374, 5381-82. Had Congress originally intended that LEAA funds should be subject to appropriation by state legislatures, the advisory review estab-

Similarly, Title I of the Elementary and Secondary Education Act of 1968 (ESEA), 20 U.S.C.A. §§241a, 241g, provides that, from the funds paid to it by the Commissioner of Education, each state educational agency shall, in turn, distribute amounts to local public educational agencies, operating state-approved programs. Moreover, the legislative history of ESEA emphasizes that the state agency is responsible for developing "such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of the federal funds paid to the State."[6]

Any doubt as to the existence of a direct and positive conflict between Act 117 and federal law must be dispelled in light of section 202 of the Intergovernmental Cooperation Act of 1968, 42 U.S.C.A. §§4201, 4212, which provides: "All Federal grant-in-aid funds made available to the States shall be properly accounted for as Federal funds in the accounts of the State." The purposes of the accounting requirements specified in the Act and in applicable regulations[7] are diametrically opposed to the concept that federal funds become state funds upon deposit in the State Treasury and that the General Assembly may appropriate them as it sees fit. Accordingly, Acts 117 and 17-A must be held invalid under the Supremacy Clause. *Townsend v. Swank*, 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968).

lished by this amendment would have been superfluous and, indeed, would have been a limitation rather than an expansion of state legislative involvement in the LEAA program.

[6] S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U. S. Code Cong. & Ad. News 1446, 1452-53. *See also*, Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U.S.C.A. §§4451, 4573 (State plan must designate single state agency to administer or supervise administration of state plan); Comprehensive Employment and Training Act of 1973, 29 U.S.C.A. §§801, 814, 815 (Prime sponsor must establish local planning councils and submit to Federal Government a comprehensive manpower plan); Intergovernmental Personnel Act of 1970, 42 U.S.C.A. §§4701, 4722(b)(1) (Governor must designate state office which will exercise primary authority and responsibility for development and administration of approved programs at the state level).

C. Wheeler v. Barrera Is Distinguishable

This Court's narrow holding in *Wheeler v. Barrera*, 417 U.S. 402 (1974), does not control the instant case. In *Wheeler*, the Court examined the legislative history of Title I of the Elementary and Secondary Education of 1968, *supra*, and concluded that Congress, by enacting 29 U.S.C.A. §1232a, sought to prohibit any arm of the Federal Government from becoming entangled in the substantive decisions affecting the curriculum, operation or personnel of local educational institutions or school systems. Given "the Act's policy of accommodating state law", the Court held that the expenditure of Title I funds must be done in such a way as not to run afoul of the Missouri Constitution's proscription against aiding any religious creed, church or sectarian purpose.[8] *Wheeler v. Barrera, supra* at 419.

[7] *See*, 34 C.F.R. §256 et seq.

[8] The proscription in article 9, §8 of the Missouri Constitution specifically applied to "any . . . school district", a direct limitation upon the state and local public educational agencies contemplated by Title I of ESEA, 20 U.S.C.A. §241g.

However, the Court repeatedly recognized in *Wheeler* "the intent of Congress to place plenary responsibility in local and state agencies for the formulation of suitable programs under the Act." 417 U.S. at 414, 424. Thus, the Court in *Wheeler* construed the relevant provisions of the Missouri Constitution as a restriction upon these state educational agencies, not a positive grant of authority to the state legislature to control Title I funds in accordance with its own policies.

Congress' aversion to the "federalization" of local educational policies in ESEA and to the "federalization" of local law enforcement in the Omnibus Crime Control and Safe Streets Act, *supra*,[9] is made manifest in the significant delegation of programmatic responsibility to the respective state planning agencies. The General Assembly's reliance upon this Court's opinion in *Wheeler v. Barrera* is thus misplaced.[10] That opinion reinforces, rather than undermines, appellants' contention that Acts 117 and 17-A of 1976 are an unconstitutional usurpation by the General Assembly of powers conferred upon Executive Branch agencies under federal law.

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[9] *Compare* the discussion of 20 U.S.C.A. §1232a in *Wheeler v. Barrera, supra* at 416 *with* the discussion of 42 U.S.C.A. §3766(a) in *Ely v. Velde*, 451 F.2d 1130, 1136 (4th Cir. 1971).

[10] Section 3 of Act 17-A of 1976 empowers the Secretary of the Budget to create a restricted receipt account for precisely those ESEA Title I funds which were at issue in *Wheeler v. Barrera, supra*. 1976 Pa. Laws 1383, 1420. Under section 5 of Act 117, Pa. Stat. Ann. tit. 72, §4615, (2a-3a), the creation of such a restricted receipt account would obviate the necessity for legislative appropriation of these funds in future years. This action by the General Assembly directly contradicts its asserted interest in exercising greater fiscal control over federal funding.

CONCLUSION

For the foregoing reasons, appellants respectfully request that Your Honorable Court deny the motion of the appellee, the General Assembly of the Commonwealth of Pennsylvania, to dismiss or affirm, and further, that the Court note jurisdiction, receive full briefs on the merits and hear oral argument to resolve the substantial question presented by this case.

Respectfully submitted,

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No. 78-642

In the Supreme Court of the United States

OCTOBER TERM, 1978

RICHARD L. THORNBURGH,
GOVERNOR OF PENNSYLVANIA, ET AL.,
APPELLANTS

v.

ROBERT E. CASEY, STATE TREASURER, and
THE GENERAL ASSEMBLY OF THE
COMMONWEALTH OF PENNSYLVANIA

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of December 11, 1978.

QUESTION PRESENTED

Whether the executive branch of the government of Pennsylvania may obtain a declaratory judgment that a state statute requiring a specific state appro-

priation as a condition of the disbursement of federal funds on deposit in the State Treasury conflicts with federal law and thus is invalid under the Supremacy Clause.

STATMENT

1. From 1961 until 1975 the General Assembly of the Commonwealth of Pennsylvania included in its annual appropriations acts both a provision requiring monies received from the federal government for federally funded programs to be paid into the State Treasury and a blanket provision appropriating those monies out of the State Treasury for the purposes for which they had been received by the State (J.S. App. 7a-8a). On June 29, 1976, the General Assembly enacted Act No. 117, which significantly altered the legislature's approach to the control of federal grant funds.[1] That Act prohibited the State Treasurer from releasing any federal funds paid into the State Treasury "unless such funds have been specifically appropriated by an act of the General Assembly." 1976 Pa. Laws 469, § 3. The General Assembly made the first such specific appropriations for federally funded programs in the Federal Augmentation Appropriations Act of 1976, Act No. 17-A, 1976 Pa. Laws 1383, which was signed by the Governor on July 1, 1976.

2. Pennsylvania established a Special Prosecutors' Office under a grant from the Law Enforcement Assistance Administration (LEAA) pursuant to Title I of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3701 *et seq.* That statute provides that states may apply for federal grants for the improvement of state law enforcement and criminal justice. A state that desires to participate in the LEAA program must submit a comprehensive state plan developed by a state planning agency subject to the jurisdiction of the governor (42 U.S.C. 3723, 3732).[2] The LEAA must review the plan submitted by the state planning agency to assure that it meets the statutory requirements (42 U.S.C. 3733). These requirements are in general designed to assure that the state plan represents a comprehensive evaluation of the state's needs for improvements in its law enforcement and criminal justice capabilities, that the state will assume both a specified share of current funding of the proposed projects and eventual responsibility for improvements originally funded by the LEAA grant, and that the planning agency is adequately equipped to administer grants made under the program.

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[1] The statute was enacted over the Governor's veto (R. 15a). ("R." refers to the Record in the Supreme Court of Pennsylvania.)

[2] The nature of Pennsylvania's comprehensive plan is summarized in an affidavit submitted by the Director of Finance of the Pennsylvania planning agency (R. 402a):

> This plan consists of, among other things, a review of the structure and resources of the entire criminal justice system in Pennsylvania, an analysis of the Commonwealth's crime and juvenile delinquency problems, an assessment of the needs of the system, and a statement of programs and priorities believed appropriate to deal with those problems and needs.

After the LEAA approves a state plan, the state is entitled to its proportional share of the funds appropriated by the Congress for LEAA grants for that fiscal year (42 U.S.C. 3736(a)). Those funds may be disbursed by the state planning agency for specific projects consistent with the approved state plan for that year (42 U.S.C. 3734).

After the state plan has been approved, the Administrator of LEAA certifies that a specified amount of federal funds has been committed to implement the plan, and that the state planning agency may withdraw these funds from the United States Treasury. The state planning agency then can submit to the Treasury a request for funds to cover disbursements under the plan, and a federal check will be sent to the state treasury for deposit in a restricted receipts account. When a project approved by the state planning agency requires funds available to it under the state plan, the planning agency requests the release of the appropriate amount from the state treasury (R. 400a-401a).[3]

By mid-1976, when the state statute at issue here became effective, the LEAA had approved a comprehensive Pennsylvania state plan that included a provision for an Office of Special Prosecutor; a subgrant contemplating that that Office would be funded entirely by LEAA monies had been approved by the Governor's Justice Commission, the Pennsylvania

[3] In Pennsylvania the request is made through the Comptroller of the Pennsylvania Department of Justice (R. 401a).

state planning agency (R. 35a; 407a-435a).[4] In accordance with the normal funding procedures outlined above, a requisition for federal funds needed to pay employees of the Special Prosecutor's Office for the week beginning July 1, 1976, was submitted to the State Treasurer. Because the release of those funds was forbidden by Act No. 117 in the absence of any specific authorizing appropriation, and because no state statute had appropriated any funds for the Special Prosecutor's Office (R. 85a-152a), the State Treasurer refused to issue a warrant for payment (R. 169a).

3. Appellants immediately filed a petition for review in the Commonwealth Court of Pennsylvania, naming the State Treasurer as respondent and alleging that Act No. 117 and the Federal Augmentation Appropriation Act of 1976 violated the Pennsylvania Constitution (R. 11a, 24a); that those acts and the Treasurer's refusal to honor requisitions for non-appropriated federal funds[5] violated the Supremacy

[4] The Office of Special Prosecutor was established pursuant to an LEAA grant in the spring of 1974 to investigate police corruption in Philadelphia (R. 603a-609a). The grant contemplated that, after completion of the Philadelphia investigation, the Office would investigate corruption throughout the Pennsylvania criminal justice system (R. 610a). By mid-1976 certain state legislators were under investigation by the Office (R. 233a-234a).

[5] Although the petition stated that the Treasurer had indicated that she would refuse to honor requisitions in the absence of state appropriations (R. 18a), the only actual refusal cited was the rejection of the requisition for the Special Prosecutor's Office (R. 22a). The record discloses no other refusal.

Clause of the federal Constitution and Title I of the Omnibus Crime Control Act (R. 25a); and that the Acts involved violated the Contracts Clauses of both federal and state Constitutions (R. 26a). The petition sought, *inter alia*, a declaratory judgment that the two state statutes are invalid, an order directing the Treasurer "to honor the requisitions presented by all proper state officials or agencies for Federal funds appropriated and allocated to them pursuant to Acts of Congress," and an injunction directing her to honor requisitions for funds for the Special Prosecutor's Office (R. 28a).[6] The General Assembly of Pennsylvania intervened as a party defendant (R. 204a, 223a, 638a) and has since assumed the major responsibility for the defense of this case.

All parties filed motions for summary judgment, supported by affidavits explaining the factual background of the case (R. 303a-632a). On December 3,

[6] Appellants also sought a preliminary injunction prohibiting the Treasurer from refusing to honor requisitions for the Special Prosecutor's Office (R. 179a-183a). The Commonwealth Court granted the motion, but only to the extent of requiring the Treasurer to honor requisitions for the Special Prosecutor's Office "to an amount not exceeding $176,843.00, being the balance of Federal LEAA funds granted for the operation of said office in the fiscal year July 1, 1975 to June 30, 1976, and remaining unexpended" (R. 219a-220a). The Treasurer complied with the preliminary injunction, the $176,843.00 has been expended by the Special Prosecutor's Office, and that expenditure is not challenged here. Since no more funds were released for maintaining the Special Prosecutor's Office, it went out of existence some months later. J.S. Supp. App. 52a (dissenting opinion); R. 443a-446a.

1976, the Commonwealth Court granted the Treasurer's and the General Assembly's motions for summary judgment (367 A. 2d 791; R. 639a-656a), characterizing the case as a "struggle of constitutional proportion between the executive and legislative branches of our State government over fiscal control of Federal funds allocated or allocable to Pennsylvania under sundry Federal aid programs authorized by Acts of Congress and administered by various Federal agencies" (367 A.2d at 793; R. 640a). The Commonwealth Court found that the state statutes in question did not violate the Pennsylvania Constitution; it also rejected the Governor's federal constitutional claims. Focusing on the alleged conflict between the state statutes and Title I of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3701 *et seq.*, the court discerned no federal intent to supersede state appropriation powers (367 A.2d at 799; R. 653a):

> The voluntary nature of participation in the Federal funding program administered by the Law Enforcement Assistance Administration, and particularly Section 301(c) of the Act, 42 U.S.C.A. § 3731(c), providing for State matching funds, lead us to conclude that Act Nos. 117-1976 and 17-A-1976 present no Supremacy Clause violation.

The Supreme Court of Pennsylvania affirmed, with two justices dissenting (J.A. App. 5a-40a; J.S. Supp. App. 47a-56a). Although noting that the controversy arose from the Treasurer's refusal to disburse monies

allocated to the Special Prosecutor's Office (J.S. App. 12a), the court did not discuss the relation between the state law and Title I. Instead, it concluded (J.S. App. 23a):

> We do not find the clear and direct conflict necessary to invalidate a state law under the Supremacy Clause, and must therefore reject appellants' second contention. The federal legislation in question encourages state control of these programs [*i.e.* programs relating to education, law enforcement and public welfare]. As long as the funds are not diverted from their intended purposes and the terms and conditions proscribed [*sic*] by the Congress are not violated, there is no inconsistency between the provisions of the federal programs and state legislative administration of the funds. The federal government has expressly given the states a wide discretion in dealing with these funds. That discretion is most logically exercised by the branch of state government which is constitutionally empowered to exercise control over *all* expenditures.

The dissenting opinion reviewed the provisions of Title I and concluded that "Congress intended to give sole control of LEAA funds to the executive branch of state government" (J.S. Supp. App. 48a). Accordingly, the dissenting justices would not have permitted the state statute involved to serve as the basis for withholding federal funds allocated to the Special Prosecutor's Office (J.S. Supp. App. 50a-51a).

DISCUSSION

I. THIS COURT'S JURISDICTION

A. Justiciability

The question litigated below and presented to this court (J.S. 8) is broad. Appellants essentially argue that every possible application of the state statutes is invalid; the parties have disputed the issue in terms of the legislature's power to assert the right to reappropriate any or all federal funds allocated to the states, and the opinions of the Pennsylvania courts accordingly have been put in equally broad terms: they have held that neither the Pennsylvania nor the federal Constitution denies the legislature fiscal control over federal funds (J.S. App. 23a; 367 A. 2d at 798-799).

The question as thus presented is not justiciable in this Court. Abstract questions of the allocation of power within a state, or between states and the United States, are political questions. *Massachusetts* v. *Mellon*, 262 U.S. 447, 482-483 (1923).[7] So long as the question turns on the bare enactment, rather than on rights of persons or property affected by the enactment, no justiciable controversy is presented. As this Court emphasized in *Massachusetts* v. *Mellon*, *supra*,

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[7] *Massachusetts* v. *Mellon* involved a state objection to a federal statute granting funds to states for specified purposes, on the ground that the statute infringed on areas of exclusive state concern and induced the State to yield its sovereign right in violation of the Tenth Amendment. The Court held that such a claim presented no justiciable issue.

262 U.S. at 484 (quoting Mr. Justice Thompson's dissent in *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 75 (1831)):[8]

> It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here.

If the abstract question presented by appellants could be answered at all, the answer would be that "the State of Pennsylvania may * * * pattern its government after the scheme set forth in the Federal Constitution or in any other way it sees fit. The Constitution does not impose on the States any particular plan for the distribution of governmental powers." *Mayor* v. *Educational Equality League*, 415 U.S. 605, 615 n.13 (1974). Although it may be that Congress could alter the structure of state governments in some respects, whether it has done so in any particular respect would depend on the statute authorizing the grant involved. To resolve

[8] Although finding it unnecessary to reach the question of the constitutionality of the state statute at issue in *Cherokee Nation*, Mr. Chief Justice Marshall stated (30 U.S. (5 Pet.) at 20) that the relief requested against the state legislature "savors too much of the exercise of political power, to be within the proper province of the judicial department."

the issue presented at J.S. 8 in this fashion would require this Court to determine the congressional intent in enacting scores of different statutes authorizing federal grants to states and their subdivisions —an intent that frequently can be discerned only from a detailed analysis of the legislative history of the particular statute involved. See, *e.g.*, *Wheeler v. Barrera*, 417 U.S. 402 (1974); *King* v. *Smith*, 392 U.S. 309 (1968).[9] To essay such an answer would be to give an advisory opinion of sweeping proportions.

Appellants refer briefly to three federal statutes to "illustrate the exclusive role that Congress has established for the executive branch of state government" (J.S. 14), while appellees refer to other federal statutes as demonstrating that Congress intended, in "federal augmentation legislation," to permit "state programs to be administered in accordance with state law" (Motion to Dismiss or Affirm

[9] There is no simple way of avoiding this analysis. Appellees suggest (Motion to Dismiss or Affirm 3 n.1, 9 n.6) that federal grant statutes can be broadly catagorized as either augmentation grants or categorical assistance, and that the application of the Pennsylvania statute to federal augmentation grants does not conflict with congressional intent. If the suggestion is simply that the controlling question is the *form* of the grant (*i.e.*, block grants, as in Title I, the size of which is determined by the state's population, versus grants, such as those for needy dependent children contained in 42 U.S.C. 601 *et seq.*, in which the grant size depends on the state's expenditures for the assisted project), the analysis is oversimplified. If the suggestion is that other factors also may be considered in categorizing particular legislative grants, appellees' distinction represents simply a way of identifying a conclusion, rather than an aid to analysis.

6).[10] Both arguments may be correct; the Pennsylvania statute may be consistent with some federal grant statutes and inconsistent with others. This Court should be reluctant to undertake the effort of identifying the particular legislative intent of every federal statute under which Pennsylvania receives federal assistance, particularly in the absence of evidence that the Treasurer has refused to release funds for programs funded by any grant other than that administered by the LEAA, and of any detailed analysis of the various federal statutes by the courts below.[11]

B. Preservation of the Federal Question

The State Treasurer refused to release funds for the Special Prosecutor's Office, relying on the state statutes at issue, and the state executive branch claims entitlement to those funds despite the state statute, relying on Title I of the Omnibus Crime Control and Safe Streets Act of 1968. The question

[10] Not surprisingly, both parties cite Title I of the Omnibus Crime Control and Safe Streets Act of 1968 as supporting their view of congressional intent, since that is the statute around which the dispute actually centers.

[11] To the extent that appellants question the political wisdom of the state appropriation acts (see J.S. 14-16), they raise issues of a kind that this Court recently refused to consider in *Holt Civic Club* v. *City of Tuscaloosa*, No. 77-515 (Nov. 28, 1978), slip op. 13-14: "From a political science standpoint, appellants' suggestions may be sound, but this Court does not sit to determine whether [the state] has chosen the soundest or most practical form of internal government possible." Cf. *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 526 (1937).

whether the Supremacy Clause is violated by the application of the state appropriation acts to funds granted to the state under that specific federal statute presents a concrete justiciable controversy. But this Court cannot resolve that controversy unless it was adequately presented to the state courts.

The question presented in the Jurisdictional Statement, although phrased as a general challenge to the state statutes, comprehends a challenge to the particular application of the statute out of which this case arose. The specific question is thus adequately presented in this Court (Rule 15(c) of the Rules of this Court). Although the matter is not entirely free from doubt, we believe that the appellants also preserved the narrow question in the state courts. The petition for review recited the State Treasurer's refusal to release funds for the Special Prosecutor's Office and asserted that the enactment of the state statutes and the Treasurer's actions in reliance on them "violate the Supremacy Clause of Article VI of the United States Constitution, Title I of the Omnibus Crime Control and Safe Streets Act of 1968" and numerous other statutes (R. 22a-23a, 25a). The relief requested included not only a judgment declaring the state appropriation acts invalid (R. 27a) but also a permanent injunction ordering the Treasurer to honor requisitions presented on behalf of the Special Prosecutor's Office for funds allocated to it under the LEAA grant (R. 28a). In both the Commonwealth Court and the Supreme Court of Pennsylvania, appellants cited the LEAA grant

program as an example of federal grants to Pennsylvania and asserted specifically that the state appropriation acts were inconsistent with Title I (appellants' Brief in Pennsylvania Supreme Court at 57).

C. Mootness

The Special Prosecutor's Office is no longer in existence (see note 6, *supra*), and the parties have informed us that the funds originally allocated in the 1976 state plan for the support of that Office have been reallocated. There is, therefore, some question whether a continuing controversy requires resolution by this Court. See *Steffel* v. *Thompson*, 415 U.S. 452, 458-460 (1974); *Ellis* v. *Dyson*, 421 U.S. 426 (1975). The petition for review sought both declaratory relief and an injunction requiring the Treasurer to release funds for the Special Prosecutor's Office. Subsequent events have clearly mooted the request for permanent injunctive relief; it does not follow, however, that the request for declaratory relief is likewise moot. See *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 123 (1974); cf. *Zwickler* v. *Koota*, 389 U.S. 241 (1967).

This Court can consider the request for declaratory relief so long as there remains "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Co.*, 312 U.S. 270, 273 (1941). There is such a substantial controversy here. Although appellants no longer seek the release of funds to pay the

1976 expenses of the Special Prosecutor's Office, at least some of them—the Governor, the Attorney General, and the Governor's Justice Commission—have an immediate and real interest in establishing the inconsistency of the state appropriation statutes with Title I. The General Counsel of the LEAA has determined that the state statutes are inconsistent with the federal Act and has informed the Attorney General of Pennsylvania that "if Pennsylvania does not comply with [the approved state plan], LEAA will initiate appropriate action under the Act. Such action could include a termination of payment of LEAA funds to Pennsylvania" (R. 393a-394a).[12] Thus, there is a substantial likelihood that the approval of future Pennslyvania state plans would be affected by the declaratory judgment that appellants seek. Here, as in *Super Tire Engineering Co.* v. *McCorkle*, *supra*, 416 U.S. at 122, "the challenged governmental activity * * * by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the [appealing] parties."

II. THE MERITS

Congress has not required any state to participate in the LEAA program, and state legislatures unquestionably have substantial roles to play in the scheme established by Title I. Appellants concede (J.S. 13) that a state legislature properly may de-

[12] It also could include recoupment of funds received and expended while the State was not complying with the conditions of the grant statute.

termine whether the state participates in the LEAA grant program at all and properly may require the exclusion of specific projects from a proposed state plan. The legislature may prevent state participation in the federal program by refusing to enact a statute authorizing the establishment of a state planning agency [13] or by refusing to appropriate the state matching funds required by 42 U.S.C. 3731(c). Because the LEAA will not approve a state plan that is inconsistent with state law, the legislature also can require the elimination from a proposed plan of a specific project by enacting a statute prohibiting the implementation of the project.[14]

But it is also clear from the language and legislative history of Title I, and particularly its amendment by the Crime Control Act of 1976 (Pub. L. No. 94-503, 94 Stat. 2407), that Congress intended the state planning agency, not the legislature, to have the primary role in developing the comprehensive state plan. In including in the 1976 Amendments a provision requiring the proposed state plan to be submitted to the state legislature at its request "for an advisory review" (Pub. L. No. 94-503, Section 206, 90 Stat. 2411, 42 U.S.C. 3726), Congress emphasized that the legislative role was to be advisory, rather than

[13] The Crime Control Act of 1976, Pub. L. No. 94-503, Section 105, 90 Stat. 2408, amended 42 U.S.C. 3723 to require that agencies not created or designated by state law "shall be so created or designated by no later than December 31, 1978."

[14] A legislature also could terminate a particular project by refusing to appropriate matching funds for *any* project in the comprehensive plan until the objectionable project had been removed from the plan.

binding on the state planning agency. S. Rep. No. 94-847, 94th Cong., 2d Sess. 16-17 (1976); H.R. Rep. No. 94-1155, 94th Cong., 2d Sess. 20 (1976).[15] This provision raises a strong argument that a legislature may not participate in the LEAA program by refusing, after a state plan has been approved by LEAA, to release federal funds that the state planning agency has allocated to a specific project in implementation of the approved state plan. Even though a legislature has a number of other ways (discussed above) to achieve its goals, this one avenue may be closed. For the reasons we now discuss, however, the Court need not decide whether Congress has prohibited legislative action of the sort involved here.

Nothing in Title I or its legislative history suggests any intent to require a state to accept federal funds. The statute is no more than a federal offer to "*assist* State and local governments in strengthening and improving law enforcement, * * * *encourage* States and units of local government to develop and adopt comprehensive plans * * *; *authorize* grants to States and units of local government * * * [and] *encourage* research and development directed toward the improvement of law enforcement * * *." 42 U.S.C. 3701 (emphasis added). The legislative his-

[15] Although the 1976 Amendments became effective several months after the enactment of the Pennsylvania statutes in issue here, the Senate and House Reports cited in the text demonstrate that Congress believed that the amendments would expand, rather than limit, the legislative participation in the planning process.

tory confirms that Title I is an offer of federal financial assistance to the states, which are entitled to receive money if they comply with the terms offered or to reject the offer if they prefer not to comply with the terms. S. Rep. No. 1097, 90th Cong., 2d Sess. (1968); H.R. Rep. No. 488, 90th Cong., 1st Sess. (1967). See also, *e.g.*, *Massachusetts* v. *Mellon*, *supra*; *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143-144 (1947); *Rosado* v. *Wyman*, 397 U.S. 397, 420-422 (1970); *Townsend* v. *Swank*, 404 U.S. 282, 291, 292 (1971) (Burger, C.J., concurring).

Because the federal legislation leaves the option of non-participation open to the state, and allows the legislature to exercise that option, it makes no difference whether appellants are correct in their contention that the state appropriation acts are inconsistent with Title I. If, as appellants maintain, Act No. 117 violates the conditions of eligibility for the federal grant, then Pennsylvania is not entitled to receive the federal funds whose availability is conditioned on compliance with the federal terms. The funds otherwise allocated to the state become available for reallocation (42 U.S.C. 3735). The executive branch of Pennsylvania cannot claim a right to receive federal money despite the legislative branch's refusal to abide by the conditions of eligibility. The whole State—including the executive branch—loses its eligibility when the legislative branch refuses to

cooperate.[16] And if appellants are incorrect in their interpretation of Title I, the result is the same, because then federal law provides no impediment to the legislative decision to withhold funds from the Special Prosecutor's Office. Thus, regardless of the merits of the claim concerning the legislative role contemplated by Congress, appellants can assert no right to federal funds in the face of the state legislation. Accordingly, appellants' request for a declaratory judgment was properly refused, because no declaration could have produced—or would in the future produce—the fiscal control appellants seek.[17]

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[16] This is not a case like *King* v. *Smith*, *supra*, or *Townsend* v. *Swank*, 404 U.S. 282 (1971), in which a private person claiming entitlement under federal law establishes that a state has accepted federal funds but nonetheless is expending them in ways prohibited by substantive federal rules. In such cases courts properly may insist that the state use the monies in the way Congress directed. But the Pennsylvania legislature did not attempt to expend the Special Prosecutor's Office funds in a way that is inconsistent with federal rules, and it did not attempt to define the beneficiaries of the federally funded program in a way inconsistent with the federal policies underlying the grant. The legislature simply decided that Pennsylvania would not operate a specific program for which federal funds were available. Consequently here, as in *PAAC* v. *Rizzo*, 502 F. 2d 306, 314-315 (3d Cir. 1974), cert. denied, 419 U.S. 1108 (1975), "an agency which fails to comport with the Act's guidelines is neither illegal nor in contravention of the Supremacy Clause. Rather, it is merely an agency that may be forced to forego federal funding." See also A. Willcox, *The Function and Nature of Grants*, 22 Ad. L. Rev. 125, 131-135 (1970).

[17] Many state legislatures are asserting the authority to review, through the appropriation process, federal grants to

CONCLUSION

The appeal should be dismissed for want of a substantial federal question.

Respectfully submitted.

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Solicitor General

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FEBRUARY 1979

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the state. See National Conference of State Legislatures, *State Legislative Control of Federal Funds* (1978); Advisory Commission on Intergovernmental Relations, *The States and Intergovernmental Aids* 79 (1977). If these efforts significantly affect the administration of federal grants, they may raise issues requiring resolution by this Court. Although we believe that it will rarely be appropriate for this Court to review a dispute, like this one, between two branches of the state government over whether the state wishes to receive a federal grant, the question of the consistency of a state reappropriation act with a federal grant statute properly could be raised by a state's challenge to a federal agency's refusal to make such a grant on the ground that the state act was inconsistent with the terms of the congressional offer of assistance.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-642

MILTON J. SHAPP, Governor; GERALD GORNISH, Acting Attorney General; CARYL M. KLINE, Secretary of Education; GEORGE S. PULAKOS, Secretary of Transportation; LEONARD BACHMAN, M.D., Secretary of Health; KENT D. SHELHAMER, Secretary of Agriculture; MAURICE K. GODDARD, Secretary of Environmental Resources, and the GOVERNOR'S JUSTICE COMMISSION,
Appellants

v.

ROBERT E. CASEY, State Treasurer and THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,
Appellees

On Appeal From the Supreme Court of Pennsylvania

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, ET AL., AS AMICI CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT OF MILTON J. SHAPP, ET AL.

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INTRODUCTION AND LIST OF AMICI CURIAE

The amici curiae in this case include the American Council on Education, which is a nonprofit corporation organized under the laws of, and located in, the District of Columbia. Founded in 1918, the Council is a membership organization of 1291 nonprofit institutions

of higher education and 169 educational associations. The Council is the major coordinating body in post-secondary education.

Also included as amici curiae are: American Association of State Colleges and Universities; National Association of State Universities and Land-Grant Colleges; American Association of Community and Junior Colleges; Association of American Universities; National Catholic Education Association; National Association for the Advancement of Colored People; American Federation of Teachers; National School Boards Association; American Personnel and Guidance Association; League of United Latin American Citizens; El Congreso Nacional de Asuntos Colegiales; Association of American Publishers; A. Philip Randolph Institute; American Library Association; United States Student Association; American Association of Community College Trustees; Association of Governing Boards; Association of American Colleges; Association of American Medical Colleges; National Association for Equal Opportunity in Higher Education; National Association of Student Financial Aid Administrators; Council for the Advancement and Support of Education; Council for the Advancement of Small Colleges; National Association of Independent Colleges and Universities; Council of Graduate Schools; Committee for Public Higher Education, New York; Commonwealth Students of Pennsylvania; Association of Pennsylvania State College and University Faculty; and the Association of Jesuit Colleges and Universities.

The amici curiae respectfully request this Court to note jurisdiction in this case and to permit the filing of briefs and oral argument by the parties involved.

Having obtained the consent of the parties to the filing of an amici curiae brief, the amici curiae will submit a brief on the merits of this case should this Court note jurisdiction.

We refer this Court to the JURISDICTIONAL STATEMENT of appellants with respect to the CITATION OF OPINIONS BELOW, the STATEMENT OF JURISDICTION, the recitation of STATUTORY PROVISIONS INVOLVED and the STATEMENT OF THE CASE.

CONSENT OF PARTIES

This amici curiae brief is being filed with the consent of all parties to this proceeding. Letters of consent of all parties have been filed with the Clerk of Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 8, clause 1 of the Constitution of the United States provides:

> The Congress shall have power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Article VI, clause 2 of the Constitution of the United States provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article III, section 24 of the Pennsylvania Constitution provides:

> No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers; but cash refunds of taxes, license fees and other charges paid or collected, but not legally due, may be paid as provided by law, without appropriation from the fund into which they were paid on warrant of the proper officer.

QUESTION PRESENTED

Is the state law in question requiring the Pennsylvania General Assembly to appropriate all Federal funds before such funds can be expended by a state agency pursuant to a Federally approved plan Constitutional, or does it violate the provisions of the Supremacy Clause and unconstitutionally limit the spending power of Congress under Article I, section 8?

GENERAL STATEMENT OF BACKGROUND AND OF INTEREST OF AMICI CURIAE

The amici curiae believe that the issue with respect to this case is substantial and that the case should be considered and decided by this Court. The principle involved in this case is of great significance to the development of constitutional law and our Federal system of government. It presents the important question of whether the Article I, section 8 spending power can be limited consistent with the Supremacy Clause by a state law empowering a state legislature to appropriate Federal funds already appropriated by Congress and duly expended by a Federal agency consistent with Federal law. The power of Congress to effectively authorize and appropriate Federal monies for the general Welfare, with necessary conditions, is under

direct attack in this case. The result of allowing this decision of the Supreme Court of Pennsylvania to stand will be the impoundment of Federal funds by the state legislature, the involvement of the state legislature in the administration and management of Federal grant programs, and lessened effectiveness of Federal programs providing for the nation's underprivileged, and for research and education. The specific interests of the amici curiae are in the areas of education, research and related areas rather than in the area of law enforcement and criminal justice, the precise subject of controversy herein. However, the decision below directly affects programs of interest to us and establishes a principle which substantially affects the areas of education and research.

The amici curiae are associations of educational institutions and professionals and of those individuals who benefit from Federal education programs, as well as other Federal programs in the social welfare area. In the past two decades, the Congress of the United States has rapidly expanded the role of the Federal government in the areas of education and research. The holding of the Pennsylvania Supreme Court would, however, result in major changes in these programs in Pennsylvania, and establish a principle very harmful to these programs generally.

The fiscal year FY 1979 budget estimate for education indicates that about $22.7 billion of Federal aid is provided to education. "Budget of the United States Government, Fiscal Year 1979, Special Analysis", ("Budget"), page 214. Of this estimated amount, about $9 billion relates to higher education and is provided to colleges and universities or their students. "Budget", *supra,* page 217. The remainder relates pri-

marily to elementary and secondary education. In addition, approximately $3.6 billion is estimated to be expended by the Federal government for research in colleges and universities, primarily in the areas of biomedical research, other basic scientific research, energy research, and research in aeronautics and space. "Budget", *supra,* page 310.

In the areas of higher education and research, Federal activity has been undertaken in different ways under different statutory conditions. First, Federal grants are provided directly to educational institutions for research activity such as grants authorized for biomedical research under the Public Health Service Act, Title V, 42 U.S.C.A. §§ 281-289, and for training in areas of specialized endeavor such as medicine, Public Health Service Act, Title V, 42 U.S.C.A. § 295f. Some Federal aid to higher education, other than for research or specialized training, is also provided through grants directly to the institutions such as the grants to support developing institutions and community colleges, 20 U.S.C.A. §§ 1051 to 1056, and § 1135, and the special programs to seek talented minority students and assist them in obtaining a higher education, 20 U.S.C.A. § 1070d-1. Second, at least one Federal grant program for assistance to educational institutions provides that assistance by means of grants to state education agencies. Community Service and Continuing Education Programs, 20 U.S.C.A. § 1001, et seq. Third, student aid is provided to assist low income students to obtain an education with some forms of such aid involving the direct provision of funds to students. Other forms of aid are provided to schools or to state educational agencies, which in turn administer the aid for the students' benefit. Student aid of the former

variety is exemplified by the Basic Educational Opportunity Grant program, 20 U.S.C.A. § 1070a, under which a student is guaranteed a scholarship in the amount of $1800 minus the family contribution expected based upon family resources. An example of the latter variety of student aid is the Supplemental Educational Opportunity Grant program, 20 U.S.C.A. § 1070b, under which eligible institutions of higher learning receive Federal funds to provide scholarship aid to needy students in addition to other aid that might be received by those students. Aid provided to state education agencies which make scholarship grants to students in need of such assistance is exemplified by the State Student Incentive Grant program, 20 U.S.C.A. § 1070c.

Most Federal aid programs providing assistance to elementary and secondary schools and students, like the State Student Incentive Grant program or the Community Service and Continuing Education Programs, provide the financial assistance to state education agencies which disburse the Federal funds to local education agencies. See for example Title I of the Elementary and Secondary Education Act, 20 U.S.C.A. § 236, et seq.

The connection between these many Federal aid programs in the education and research areas and the state, which then triggers the application of state appropriation laws such as the ones at issue in this case, is the fact that some of these Federal aid programs allocate funds to state education agencies and others make funds directly available to educational institutions, many of which are state institutions. About 47.5% of all colleges and universities are state higher educational institutions and are treated as agencies of state

government for budgetary and other purposes. A. Podolsky and C. R. Smith, "Education Directory, Colleges and Universities, 1977-78", P. XXVII. About 80% of all postsecondary students are in state institutions. "Condition of Education", by National Center for Educational Statistics, 1978 Edition.

The effective execution of these many Federal programs, according to the conditions established by Congress and the relevant Federal agencies, is of direct interest to the amici curiae. The educational institutions represented by the amici curiae have an interest in the receipt of needed Federal aid for students, for research and for other programs, and its use according to Federal conditions without unauthorized state legislative intervention. The individual beneficiaries of these programs, both student aid and special education and social service programs, have an interest in the continued receipt of Federal aid and assistance without the unauthorized interference of state legislatures. The intervention of state legislatures to preempt the spending power of Congress is a great danger to continued Federal aid to our institutions and constituents and a dangerous precedent with respect to all Federal aid programs in the education or social welfare field which involve state agencies or institutions as recipients.

THE SUBSTANTIAL NATURE OF THE QUESTION INVOLVED

The specific controversy posed by this case involves the failure of the General Assembly to appropriate Federal funds allocated to Pennsylvania for the support of the Office of the Special Prosecutor. OPINION, SUPREME COURT OF PA., JURISDICTIONAL STATEMENT, page 12a. In their JURISDICTIONAL STATEMENT, appellants state that the refusal of the Legislature to appropriate the Federal funds resulted in the demise of that Office. JURISDICTIONAL STATEMENT, page 14. Under 1976 Pa. Laws 469, Pa. Stat. Ann. tit. 72, §§ 4611-4617 (Supp. 1978), it is provided that Federal funds be deposited in the General Fund of the State and shall be available for appropriation by the General Assembly. The State Treasurer cannot release funds without such an appropriation. Federal funds not appropriated remain part of Pennsylvania's General Fund.

A. The Power of Congress To Spend for the General Welfare

Under Article I, section 8, clause 1 of the United States Constitution, the Congress is specifically provided the power to spend money for the general Welfare. That grant of power is expressed in the authority to "provide for the common Defense and general Welfare of the United States". See *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937), and *Helvering* v. *Davis,* 301 U.S. 619 (1937) for the elaboration of that principle. Essentially, this Court has held Congressional spending authority to be limited only by individual rights granted under the Bill of Rights, *Flemming* v. *Nestor,* 363 U.S. 603 (1960), and by the requirement that the Federal interest involved be general or national, not private, *Helvering* v. *Davis,* 301 U.S. 619 (1937). The power of Congress to establish conditions upon the use of these Federal monies as a means of prescribing the national objectives to be achieved and the necessary and proper means of achieving them has long been recognized by this Court. *Oklahoma* v. *U.S. Civil Service Commission,* 330 U.S. 127 (1947). In *Helvering* v. *Davis, supra,* at page 645, Justice Cardozo gave clear guidance as to the nature of this Congressional power to spend and conditon spending to effectuate national purposes. He stated that "When money is spent

to promote the general welfare, the concept of welfare or its opposite, is shaped by Congress, not the states". Recently in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), this Court has reaffirmed that most basic of Constitutional principles. The General Welfare Clause as it was explained in *Buckley* v. *Valeo, supra,* is a grant of power "the scope of which is quite expansive, particularly in view of the enlargement of the power by the Necessary and Proper Clause". *Buckley* v. *Valeo, supra,* at page 90.

It is just this expansive and enlarged Congressional authority, and the extent of state power to limit it, which is at issue. Can the Pennsylvania General Assembly exercise appropriation power over Federal money when the Congressional statute creating the Federal spending program does not authorize such action? Basically, this Court has held the spending power, enlarged through the Necessary and Proper Clause, plenary, and generally not limited by the Tenth Amendment's reservation of powers to the states, nor by state statutes such as the ones in question in this case. State statutes interfering with the expenditure of Federal funds pursuant to Federal law would unconstitutionally limit the spending power of Congress and violate the Supremacy Clause. *King* v. *Smith,* 392 U.S. 309 (1968).

B. The Supremacy Clause and the Supremacy of Federal Law Where State Statutes Are Inconsistent With Federal Law

State laws which have the effect of nullifying programs duly authorized by Congress using its specified Constitutional powers have long been held to violate the Supremacy Clause of the Constitution and therefore to be invalid, at least as applied to the Federal program in question. *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819); *King* v. *Smith,* 392 U.S. 309 (1968); *Townsend* v. *Swank,* 404 U.S. 282 (1971). The spending power cases such as *King* v. *Smith,* 392 U.S. 309 (1968), and *Townsend* v. *Swank, supra,* have uniformly held that power immune from state laws which prevent the proper execution of the national objectives involved.

The supremacy of Federal grant-in-aid and other spending statutes relative to state statutes such as the one in question in this case is of equal importance in many respects to the necessary supremacy of Federal law reflected in *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819). In *McCulloch* v. *Maryland, supra,* the issue involved the powers of the Bank of the United States, an institution of great importance in dealing with the serious fiscal plight of our nation in the early 19th Century. Today, the issue involves a power of Congress no less significant, the power to authorize and spend funds to deal with matters of serious national interest such as poverty, unemployment and education. Also involved is the Congressional power to select from among various alternatives the necessary and proper means to achieve these Federal ends and to have these means executed without interference from state action which would render these Federal activities ineffective.

C. The Specific Congressional Determinations of Necessary and Proper Means of Exercising the Spending Authority in This Case and the Supremacy of Such Means Over Inconsistent State Law

In this case, Congress clearly exercised its well recognized power to specifically shape the goals and programs involving the general welfare of the nation in the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C.A. § 3701, et seq. As Justice Cardozo stated in *Helvering* v. *Davis,* 301 U.S. 619 (1937), at page 645: "When money is spent to promote the gen-

eral welfare, the concept of welfare or the opposite, is shaped by Congress, not the states". Any state laws conflicting with the Congressionally mandated means clearly would violate the Supremacy Clause. *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819); *King* v. *Smith,* 392 U.S. 309 (1968).

The intent of Congress with regard to the means of selecting recipients of aid and disbursing such aid to recipients under the statute involved in this case is abundantly clear. It is equally clear in those many Federal aid programs affecting education such as the various student aid and educational grant programs described previously in this brief. State laws interfering with the execution of these programs through the means set forth by the Congress are also invalid under the Supremacy Clause.

The general purpose of the Law Enforcement Assistance Program authorized by the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C.A. § 3701, et seq., is to provide financial and other assistance to encourage states and units of general purpose local government to develop comprehensive law enforcement and criminal justice plans and to carry out programs and projects to improve and strengthen law enforcement and criminal justice in the state. 42 U.S.C.A. §§ 3721 and 3731(a). Federal assistance is also provided to establish the state planning agencies and it is specified that such agencies shall be subject to the jurisdiction of the chief executive in the state. 42 U.S.C.A. §§ 3722 and 3723. The plan to be developed by this agency designated by the Governor is to "define and develop" the programs and projects in the law enforcement and criminal justice system to be carried out. 42 U.S.C.A. § 3723(b). The submission and approval of this plan is a condition of receipt of Federal funds to support programs in the state and the plan is the basis for expenditures by the state. 42 U.S.C.A. § 3732. The plan must specify that the state planning agency is responsible for "the administration of such grants by the State planning agency". 42 U.S.C.A. § 3733(a)(1). Grants are made by the state planning agency to local governments and funds are disbursed when the "state planning agency determines that . . . a plan or application is in accordance with the purposes" of the program "and in conformance with the plan". 42 U.S.C.A. §§ 3734(a). Furthermore, 42 U.S.C.A. § 3763, in describing the authority and responsibility of the Justice Department in this program, states that the Department shall review "the execution of the comprehensive plan to determine whether the State planning agency is coordinating and controlling the disbursement of the Federal funds provided under this Chapter".

Clearly, therefore, at the state level, it is the state planning agency which is to establish the priorities and projects to be funded since it must define those projects in its state plan and it must make the decisions as to who receives grants and the amounts thereof, as well as controlling the disbursement of funds. Since the state planning agency is clearly required to coordinate and control the disbursement of the Federal funds involved, it seems clear that the state legislature cannot do so. It seems clear that the power of the legislature to appropriate funds is the power to coordinate and disburse the funds. Disbursement cannot be controlled if the state legislature determines funding priorities and policies as it does through the appropriation power.

It is also well settled that state plan requirements and other Federal conditions related to the receipt of Federal aid represent contractual undertakings and are binding on the states or other entities receiving these funds. *Townsend* v. *Swank*, 404 U.S. 282 (1971); *King* v. *Smith*, 392 U.S. 309 (1968); *Ely* v. *Velde*, 497 F.2d 252 (1974); *United States* v. *County School Board of Prince George County, Va.*, 221 F. Supp. 93 (E.D. Va. 1963). State laws and actions which nullify or render inoperative the Federal conditions of participation in the grant programs are invalid exercises of state authority since they contravene the provisions of the Supremacy Clause and unconstitutionally limit the exercise of the spending power of Congress. *Townsend* v. *Swank, supra; King* v. *Smith, supra.* These two cases are directly on point with regard to the issues in this case.

Quite clearly, the Omnibus Crime Control and Safe Streets Act vests the authority to execute the Federal program involved in the Justice Department at the Federal level and in the Governor and his designated state planning agency at the state level. It does not vest such powers in the state legislature. The Congress has established a clear and coherent scheme under which Federal spending to achieve significant national purposes is to be executed and administered by the executive branches of government at the Federal and state levels. Those two agencies enter into agreements pursuant to Federal law to achieve the Federal objectives. These agreements constitute contracts and Federal law governs these contracts. State legislation interjecting the state legislature into this scheme as the agency controlling the flow of Federal funds is totally inconsistent with this statutory scheme and violates the Supremacy

Clause and unconstitutionally limits the power of Congress to spend for the general Welfare.

In addition, to the issue of the supremacy of Federal law, there is also the issue of a state law impairing a contract between the Federal agency and state agencies involved in implementing the program as the paragraph above indicates.

In the education field, execution of grant-in-aid programs is similar to that in the law enforcement field. Agreements are generally made between the Department of HEW and either state education agencies or universities and colleges, many of which are state institutions. These state colleges and universities are usually established under state constitutional or statutory law, which vests sole authority for the governance of such institutions in boards of trustees or regents. The grant agreements between those institutions and the Federal government are, in our opinion, equally immune from state legislative intervention unauthorized by the Federal statute in question.

It should be noted that Congress specifically dealt with the role of state legislatures in the Law Enforcement Assistance Program in addition to specifically assigning administration and spending authority to the state planning agencies. Congress assigned only two very limited roles to the state legislatures. In 42 U.S.C.A. § 3726, the state legislature is given a specific, but very limited, power to undertake an "advisory review" of the state plan developed by the state planning agency prior to its submission to the Justice Department for review and approval. The power of review is limited to an advisory one. Had the Congress wanted to expand that power to include the authority to appropriate and disburse funds, it could have done so. It

has not! The only reference to state legislative power to appropriate is one limited to appropriating any state matching share needed for this program. 42 U.S. C.A. § 3724. This power to appropriate the state funds needed is the second of the two specific authorities given the state legislature.

That the Congress knew how to vest appropriation power over Federal funds in state legislatures is clear from those very few instances where it has chosen to do so. See *King County, Washington* v. *Seattle School District No. 1,* 263 U.S. 361 (1923) dealing with state legislative power to appropriate revenues received from national forest reserves to public roads and public schools; also see State and Local Fiscal Assistance Act of 1972, 31 U.S.C.A. § 1221, et seq.

Also related to the question of authority to spend Federal funds and Congressional spending authority in this case are the cases dealing with the matter of impoundment of Federal funds by Federal agencies. The integrity of Congressional authorizations and spending has been upheld by this Court and lower courts in recent years against incursions by the Executive Branch. *Train* v. *City of New York,* 420 U.S. 35 (1975); *Local 2677, the American Federation of Government Employees* v. *Phillips,* 358 F. Supp. 60 (D.D.C. 1973). As those two cases indicate, when Federal law removes discretion from an executive agency of government to affect spending, that law must be complied with. Can it be that state legislatures may now impound duly authorized and appropriated Federal funds as the Pennsylvania General Assembly has done in this case with no explicit Federal statutory authority to do so when the President cannot? The Federal statute in this case gives no specific discretion whatsoever over

the spending of Federal funds to the General Assembly. It vests that power in the state planning agency.

D. Lack of Adequate Independent State Grounds for Decision

While the General Assembly may be the general policy-making body under the Pennsylvania Constitution, the Pennsylvania Supreme Court has overly simplified the issue in this case by reasoning that the General Assembly needs authority to appropriate all Federal funds in order to exercise that power. See JURISDICTIONAL STATEMENT, page 20, citing the opinion in *Shapp, et al.* v. *Sloan, et al.* by the Pennsylvania Supreme Court. The power of the Congress to authorize and appropriate Federal money to achieve national purposes and the power of the Pennsylvania General Assembly to determine what programs and institutions will be established in Pennsylvania in areas of traditional state concern can be accommodated without the General Assembly being empowered to appropriate Federal funds. The Supreme Court of Pennsylvania has taken the position that this case turns essentially on the broad authority of the General Assembly under State law. The General Assembly in its law-making role can authorize the creation of State institutions and enable them to carry out specific purposes and only those purposes. Likewise, it can repeal authority or specifically prohibit the exercise of authority by state institutions. But the power to control the flow, direction and conditions applicable to duly appropriated Federal funds must be created by the Federal laws authorizing or appropriating those funds. *Townsend* v. *Swank,* 404 U.S. 282 (1971). A state legislature cannot constitutionally prevent appropriated Federal funds from being applied to their Federal purposes, nor determine particular uses inconsistent with Fed-

eral purposes, once the state has established the necessary institutions and complied with the Federal requirements which are preconditions to the allotment of Federal funds to the state. *Townsend* v. *Swank,* 404 U.S. 282 (1971); *King* v. *Smith,* 392 U.S. 309 (1968). In this case, the statute authorizing the Law Enforcement Assistance Program, 42 U.S.C.A. § 3701, et seq., like the Social Security Act provisions in *Townsend* v. *Swank, supra,* does not empower the General Assembly to take the actions it has taken with respect to the use of Federal funds (failing to appropriate and release them for use according to the Federal conditions). State legislatures are generally empowered by state law to establish, disestablish, or limit the powers of state agencies, but once such agencies exist and duly act to participate in a Federal program, then the legislature cannot interfere with Federal money in ways inconsistent with the Federal provisions enabling the operation of the Federal program. If the state legislature had such power, the Congress would be quite powerless to spend funds for the general Welfare according to means it believed necessary and proper, whenever those means in any way involved a state agency or institution.

It should also be noted that the citizens of the states are well represented in the Congress of the United States, and that this representation is germane to the question of balancing the Federal and state interests involved in this case. This political representation is a substantial safeguard to Congressional action which might adversely affect state legislatures. It is a very significant safeguard to protect the delicate balance between state and Federal governments inherent in our Federal system. See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition of the National Government,* 54 Colum. L. Rev. 543 (1954). The effective political representation of states and their legislatures is best evidenced by the substantial role in the Federal Revenue Sharing Program, State and Local Fiscal Relief Assistance Act of 1972, 31 U.S.C.A. § 1221, et seq., of state government and state legislatures which determine the uses for Federal funds in that program. Such powers for state legislatures are not found in 42 U.S.C.A. § 3701, et seq., or in any of the other Federal laws under which Federal funds involved in this case were appropriated.

E. Harm Resulting From Pennsylvania Supreme Court Decision

We submit that there are very substantial questions regarding the supremacy of Federal law and the power of Congress to spend for the general Welfare involved in this case. To fail to note jurisdiction and to let the Supreme Court of Pennsylvania decision stand will seriously undermine the Congressional spending authority and set back important Federal aid programs in education and many other areas of national importance. We therefore urge that the Court note jurisdiction in this case.

That substantial harm will result from this decision of the Pennsylvania Supreme Court is apparent. State legislatures with powers similar to those in Pennsylvania may hereafter refuse to spend Federal money already appropriated and allocated to the state as is the case in this matter. Programs to which Federal and state commitments have been made will be eliminated as evidenced by the demise of the Office of the Special Prosecutor in this case. The administration of Federal aid will be delayed due to the interposition of state legislatures in matters of administration, and

this will be particularly so in those 35 states with very short legislative sessions. State schools will be at a disadvantage in seeking Federal aid compared to private schools, for state schools will have their Federal aid subject to state legislative direction. Finally, education and research, areas traditionally left to the discretion of universities and Federal agencies operating under carefully structured Federal review procedures (e.g., outside peer review of research and training grants), may possibly be subject to political intrusion by state legislatures.

Upon the resolution of this case stands the integrity of Federal spending to achieve substantial national interests in education, research and social welfare.

CONCLUSION

We therefore urge that this Court note jurisdiction, receive full briefs on the merits and hear oral arguments in this case.

Respectfully submitted,

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